CERTIFICATE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 186.

IN THE MATTER OF MORRIS STRAUSS.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED FEBRUARY 3, 1904.

(19,229.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 22, 1904.

1 United States Circuit Court of Appeals, Second Circuit.

In the Matter of MORRIS STRAUSS.

This matter was brought to this court upon appeal by the petitioner from an order of the United States district court for the southern district of New York, dated September 16, 1902, discharging two writs of *habeas corpus* and a writ of certiorari, and remanding him to the custody of the police commissioner of the city of New York.

On the 25th of November, 1903, this court filed a decision affirming the said order of the district court. Afterwards, and on the 7th day of December, 1903, the petitioner moved the court that certain questions be certified to the Supreme Court of the United States for its determination. By these questions the petitioner seeks to present to the Supreme Court the proposition that section 5278 of the Revised Statutes and also the proceedings in Ohio charging the petitioner with crime are in contravention of article IV, section 2, sub-division 2 of the Constitution of the United States.

Under the provisions of the act of March 31, 1891, establishing the circuit courts of appeal, as interpreted by the Supreme
2 Court and by this court, we are not permitted to decide questions involving the construction or application of the Constitution or the constitutionality of any law of the United States.

U. S. *v.* Jahn, 155 U. S. 109.
Carter *v.* Roberts, 177 U. S. 496.
Cincinnati &c. Railway Co. *v.* Thiebaud, *id.*, 615.
American Sugar Co. *v.* New Orleans, 181 U. S. 277.
U. S. *v.* Lee Yen Tai, 113 Fed. Rep. 465.
Sun Publishing Ass'n *v.* Edwards, (decided by this court in March, 1903).

When these constitutional questions are presented and a certificate is requested, as now advised, we deem it our duty to grant the request irrespective of any opinion which we may entertain as to the merits of the proposition which is involved. In accordance with the practice as above indicated, we make the certificate as requested.

Statement of Facts.

The petitioner was charged by affidavit before a justice of the peace of Youngstown township, Ohio, with the crime of obtaining four hundred dollars' worth of jewelry at Youngstown, Ohio, by false pretences, contrary to the laws of that State. He was arrested as a fugitive from justice and brought before a magistrate of the city of New York August 11, 1902.

3 The governor of Ohio having duly made requisition, dated August 13, 1902, the governor of New York, after a hearing

at which the accused was represented by counsel, issued his warrant dated August 22, 1902, directed to the police commissioner of New York city, directing him to arrest the accused and deliver him to the duly accredited agent of Ohio, to be taken to that State.

The warrant recites that it has been represented by the governor of Ohio that the accused stands charged in that State of the crime of securing property by false pretences, which is a crime under the law of Ohio, and that he has fled from that State. The warrant further recites that the requisition was accompanied by affidavits and other papers, duly certified by the governor of Ohio to be authentic, charging the accused with having committed the said crime and with having fled from Ohio and taken refuge in the State of New York.

On the 29th of August a writ of *habeas corpus* to test the validity of the governor's warrant was allowed by the district court and was served on that day. The police commissioner made return to the writ that he held the accused by virtue of the governor's warrant. On September 16, 1902, the district court discharged both writs and remanded the accused to the custody of the police commissioner. The propositions presented by the questions hereafter certified were, in substance, presented by the record in the district court and in this court.

4 Upon the foregoing facts we certify the following questions of law in accordance with the provisions of section IV of the act of March 31, 1891:

First.

Whether the delivery up of an alleged fugitive from justice against whom a complaint for the crime of securing property by false pretences has been sworn to and is pending before a justice of the peace of Ohio having the jurisdiction conferred upon him by the laws of that State, is authorized in view of the provisions of article IV, section 2, sub-division 2 of the constitution.

Second.

Is section 5278 of the Revised Statutes in as far as it authorizes the delivery up of an alleged fugitive from justice upon an affidavit of complaint pending before a justice of the peace in Ohio for the crime of securing property by false pretences, which said justice of the peace has the jurisdiction conferred upon him by the laws of the said State, violative of article IV, section 2, sub-division 2 of the constitution.

Dated December 14, 1903.

E. HENRY LACOMBE,
Circuit Judge.
WM. K. TOWNSEND,
Circuit Judge.
ALFRED C. COXE,
Circuit Judge.

5 UNITED STATES OF AMERICA,
Southern District of New York.

I, William Parkin, clerk of the United States circuit court of appeals for the second circuit do hereby certify that the foregoing certificate was filed and entered of record in my office on the 14th day of December, 1903, and as directed by the judges of said court, the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

New York, December 15, 1903.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

6 [Endorsed:] United States circuit court of appeals, second circuit. In the matter of the petition of Morris Strauss. Certificate to U. S. Supreme Court. United States court of appeals, second circuit. Filed Dec. 14, 1903. William Parkin, clerk.

Endorsed on cover: File No. 19,229. U. S. C. C. of appeals, 2nd circuit. Term No. 186. In the matter of Morris Strauss. Filed February 3rd, 1904. File No. 19,229.

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FEB 4 1905

IN THE

Supreme Court of the United States.

In the Matter

of

MORRIS STRAUSS.

No. 186.

BRIEF FOR APPELLANT.

MAX J. KOHLER,
MOSES H. GROSSMAN,
Of Counsel for Appellant.

APPEAL PRINTING CO., 14 VESEY ST. TEL. 192 CORTLANDT.

Supreme Court

OF THE UNITED STATES.

In the Matter of MORRIS STRAUSS.	On Habeas Corpus.

Brief for Morris Strauss, Appellant.

This cause is here on a certificate from the United States Circuit Court of Appeals for the Second Circuit of certain questions of constitutional law concerning rendition of alleged fugitives from justice.

The cause arose on habeas corpus, issued out of the United States District Court for the Southern District of New York, to review appellant's detention under a warrant for his rendition to Ohio, issued by the Governor of New York. Appellant was proceeded against by affidavit before a justice of the peace of Youngstown Township, Ohio, for the crime of obtaining $400.00 worth of jewelry at that place by alleged false pretences. Under the

Ohio law, this charge is a felony, triable only on indictment before a jury, and the justice of the peace in question has jurisdiction to hold such defendant only for trial before another tribunal, to answer any indictment that may be found. Defendant was arrested in New York on August 22d, 1902, on a warrant issued by the Governor of New York, based on this charge. The writ of habeas corpus was discharged by the United States District Court, Judge ADAMS sitting, and on appeal this holding was affirmed by the Circuit Court of Appeals (Matter of Strauss, 126 Fed. Rep., 327). In both courts defendant-appellant raised various questions of statutory construction, considered by the Circuit Court of Appeals in the opinion cited, as also the constitutional questions certified to this Court, which the Circuit Court of Appeals correctly deemed it had no power to decide under the Act of March 3, 1901, and hence has certified to this court.

The two questions certified, put in different forms by the Circuit Court of Appeals, really involve only one question, appellant's contention that the federal constitution (Article IV, Section 2, Sul d. 2), authorizes no interstate rendition of persons proceeded against for an indictable offence before a mere committing magistrate, having authority only to hold defendant for the Grand Jury. Incidentally, the further claim is made that, if Section 5278 be sufficient statutory authority to the contrary, it is in violation of that provision of the constitution, the Circuit Court of Appeals having so construed it (Matter of Strauss, 126 Fed. Rep., 327), appellant contending, however, that it must be read distributively and does not authorize removal for

indictable offences on mere affidavit before a committing magistrate.

Article IV, Section 2, Subd. 2 of the Constitution on reads:

> "A person *charged* in any state with treason, felony or other crime who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having *jurisdiction of the crime.*"

Revised Statutes 5278 reads:

> "Whenever the executive authority of any state or territory demands any person as a fugitive from justice, of the executive authority of any state or territory to which such person has fled, and produces a copy of an *indictment found or an affidavit made* before a magistrate of any state or territory, *charging* the person demanded with having committed treason, felony or other crime, certified as authentic by the Governor or Chief Magistrate of the state or territory from whence the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled, to cause him to be arrested and secured and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive and to cause the fugitive to be delivered to such agent when he shall appear."

The offence charged against defendant is embraced by the Ohio Revised Statutes, Section 7076 (Bates' Annotated 4th Ed.), which reads as follows:

Section 7076:

> "Whoever, by any false pretense, with in-
> "tent to defraud, obtains from any person any-
> "thing of value * * * shall, if the value of
> "the property or instrument so procured and
> "sold, bartered or disposed of or offered to be
> "sold, bartered or disposed of, *is $35 or*
> "*more, be imprisoned in the penitentiary, not*
> "*more than three years, nor less than one*
> "*year;* or, if the value is less than that sum,
> "be fined not more than $100, nor less than
> "$10, or imprisoned not more than sixty days
> "nor less than ten days, or both."

Under the Ohio statutes the defendant is proceeded against for a felony (Rev. St. Ohio, 6795), as the prosecuting officer certifies in the papers included in the record below (fol. 118), more than $35.00 being charged as the value, and in fact, under the Ohio statutes regarding interstate rendition (Rev. Statutes Ohio, Section 95), demand of alleged fugitives from justice from Ohio is authorized only for felony.

The Ohio statute cited (Sec. 6795) defines felony as being "all offenses which may be punished by death or imprisonment in the penitentiary," a definition in line with the decisions of this court (*Ex p.* Wilson, 114 U. S., 417; Mackin vs U. S., 117 U. S., 348), and of course a justice of the peace cannot impanel a jury, and accord the jury trial preserved by Article I, Sec. 8 of the Bill of Rights of the Ohio Constitution, reading:

> "The right of trial by jury shall be inviolate" (Bates' Anno. Rev. St. of Ohio, Ed. of 1904, page 3665).

In fact, a specific Ohio statute recognizes the requirement of an indictment for false pretences,

Sec. 7315 (Bates' Anno. Rev. St., 4th Ed., p. 3647), reading:

> "When an indictment charges an offense against property by larceny, embezzlement, or obtaining by false pretense, the jury, on conviction, shall ascertain and declare in the verdict the value of the property stolen, embezzled, or falsely obtained."

A justice of the peace of Ohio has no right to try for felony, his powers being defined by Sections 7131 and 7106 constituting him a "magistrate" whose powers are declared by Rev. St., Sec. 7147, reading:

> "*Proceedings when there is no plea of guilty.* When the accused is brought before the magistrate and there is no plea of guilty, he shall as soon as may be, in the presence of the accused, inquire into the *complaint*; and if it appear that an offense has been committed, and that there is probable cause to believe the prisoner guilty, he shall order him to enter into a recognizance, with good and sufficient surety, in such an amount as he may deem reasonable, for his appearance at the proper time, before the proper court; otherwise he shall discharge him from custody; but if the offense charged is a misdemeanor, and the accused, in a writing subscribed by him, and filed before or during the examination, waive a jury and submit to be tried by the magistrate, he may render final judgment."

The Ohio statutes use the terms "affidavit" and "complaint" interchangeably, Rev. St., Section 7133, providing:

> "When an *affidavit* charging any person with the commission of an offense is filed with such magistrate he shall, if he has

reasonable ground to believe that the offense charged has been committed, issue a warrant for the arrest of the accused."

Sec. 7016 reads:

"When *complaint* is made in writing, upon oath, before a justice of the peace," etc.

It is of course settled both by the Ohio and the federal authorities, that the offense here set forth in the complaint is a felony, and an infamous offence triable on indictment only by jury, and cannot be tried before the justices of the peace before whom it was taken.

Fletcher vs. State, 7 Ohio Circ. D , 316.
Ward vs. State, 5 Ohio Nisi Prius, 81.
Inwood vs. State, 42 Ohio St., 186.
State *ex rel.* vs. Hamilton, 3 Ohio C. C., 10.
See also *Ex p.* Wilson, 114 U. S., 417.
Mackin vs. U. S., 117 U. S., 348.
In re Dana, 7 Benedict, 1.

Under the every day practice in Ohio, justices of the peace act only as committing magistrates in felony cases (Hedges vs. State, 18 Ohio State, 420; State vs. Ritty, 23 Ohio St., 562).

The question whether rendition for felony, triable on indictment only by the laws of the demanding state, is authorized before indictment, is of course an entirely different question than the undisputed right of a State Legislature to abolish indictment entirely.

Hurtado vs. California, 110 U. S., 516.

The right to remove fugitives from justice for crimes not triable by indictment, especially in jurisdictions where indictment is abolished, is not

controverted, though difficult to be sustained under an over-literal construction of the statute, R. S. 5278 (*Ex p.* Hart, 63 F. R., 259, CCA), but Ohio is not one of the states that has abolished indictment, and under Ohio law this defendant can be tried only on indictment.

The duty of the federal courts to take judicial notice of the laws of the different states is of course established (Gormeley vs. Bunyan, 138 U. S., 623, 635; Roberts vs. Reilly, 116 U. S., 80, 96), hence the statutes herein cited are properly before this court, as they were judicially noticed also in the lower courts.

After deciding the statutory questions raised by appellant, the Circuit Court of Appeals had authority to certify the constitutional questions also involved, as is indicated by the cases cited by it in its certificate. Two of the decisions of that court cited have since been decided on the merits in this court (U. S. vs. Lee Yen Tai, 185 U. S., 213; affg. 113 F. R., 465; Sun Pub. Asso. vs. Edwards, 194 U. S., 377, affg. 121 F. R., 826). See particularly U. S. vs. Lee Yen Tai, 113 F. R., 465; Carter vs. Roberts, 177 U. S., 496 at 500; Amer. Sugar Co. vs. New Orleans, 181 U. S., 277; also Spreckels Sugar Refining Co. vs. McClaim, 192 U. S., 397.

POINT I.

The Constitution providing for the delivery up only of persons "charged with treason, felony or other crime, * * * to be removed to the state having jurisdiction of the crime" it is herein urged that this means that the charge must be pending in a court that can try defendant, and not merely before a committing magistrate who can only discharge or hold for another tribunal.

In the leading case of Kentucky vs Dennison, 24 Howard, 66, Chief Justice TANEY, as the spokesman of this court, said, concerning this provision:

> "The Governor of the state could not, upon a charge made before him, demand the fugitive, for, according to the principles upon which all of our institutions are founded, the executive department can act only in subordination to the judicial department, where rights of person or property are concerned, and its duty in these cases consists only in aiding to support the judicial process and enforcing its authority, when its interposition for that purpose becomes necessary, and is called for by the judicial department *The executive authority* of the state, therefore, *was not authorized by this article to make the demand* unless the party *was charged in the regular course of judicial proceedings.* And it was equally necessary that the executive authority of the state upon which the demand was made, when called on to render his aid, should be satisfied by competent proof that the party was so charged. This pro-

ceeding, when duly authenticated, is his authority for arresting the offender."

As an indictment constituted the basis of the demand in the case then before this court, it was not called upon to determine whether a complaint in mere preliminary proceedings constituted a "charge in the regular course of judicial proceedings."

Hon. W. W. Thornton, a well-known legal writer having special familiarity with interstate rendition through his official relations, as Deputy Attorney General, to the Governor of Indiana in such cases, says in an able article contributed by him in 1882, entitled "Fugitives from Justice—Some Points of Practice" to the Criminal Law Magazine, Vol. III, page 787 at 792:

> "*The rendition of fugitives from justice is frequently sought upon an affidavit filed before a committing magistrate.* It is not the object of such a proceeding to try and convict the criminal in that court, but simply to bind him over for trial in a higher court. It is the experience of almost every governor to meet with such demands. *We have but little hesitancy in saying that such a demand should be refused. It is not a 'charge in the regular course of judicial proceedings,' within the meaning of the constitutional provision. The constitution contemplates a charge in a court where there can be a trial and conviction and not simply a decision whether the accused shall give bond for his appearance in another court to answer a charge that may or may not be preferred against him.*"

This language precisely accords with the holding of this court as to the nature of preliminary proceedings, made under another statute (Rev. St. 643), the one governing removal to the federal

courts of prosecutions against persons claiming to have acted under federal authority, reported as

Virginia vs. Paul, 148 U. S., 107 at 119,

where Mr. Justice GRAY delivered the opinion of this Court, saying:

> "*Proceedings before a magistrate to commit a person to jail*, or to hold him, in order to secure his appearance to answer for a crime or offense, *which the magistrate has no jurisdiction himself to try*, before the court in which he may be prosecuted and tried, *are but preliminary to the prosecution, and are no more a commencement of the prosecution than is an arrest by an officer without a warrant for a felony committed in his presence.*"

The court proceeded to concede that contrary views had prevailed in the Circuit Courts under this provision (Sec. 643), but disregarded the numerical weight of authority, in order to approve instead of the language of Mr. Justice GRIER in

Commw. of Pa. vs. Artman, 5 Phil., 304; 19 Fed. Cases, 10, 952:

> "The prosecution has not been commenced in the state court. A warrant has been issued by a justice of the peace, and the defendants have been arrested preparatory to the commencement of a prosecution in the state court but the attorney for the commonwealth has not sent a bill to the grand jury. We do not know therefore, whether the commonwealth of Pennsylvania intends to prosecute the defendants for the alleged offense, or *whether the grand jury will find a bill*, without which the prosecution cannot be said to be commenced in the state court."

Virginia vs. Felts, 133 F. R., 85, 87, accordingly.

Of course if the cause be triable before the justice of the peace, and he is not sitting merely as a committing magistrate, a different rule obtains Virginia vs. Bingham, 88 F. R., 561, distinguishing Virginia vs. Paul, *supra*.

It is of course true that these cases arose under a different statute, as is pointed out by the Circuit Court of Appeals below (Matter of Strauss, 126 Fed. Rep., 327, 330), and also that another independent line of argument may have also in part led to the holding in these cases, but it is submitted that the nature of these preliminary proceedings is accurately stated in them, and that they apply here also.

Historically, it is certainly true that these preliminary proceedings were merely a melioration of the practice of arresting without warrants for crime, to secure presence on indictment to be found, as is so tersely stated by Mr. Justice Gray, *supra*.

> Stephens' History of the Criminal Law, 1, 190-2.
>
> Kinghorn on "The Preliminary Investigation of Crime," in Crim. Law Mag., Vol. III, p. 297.
>
> Encycl. of Pleadings & Practice, Vol. XVI, p. 820, "Preliminary Examination."

An examination of Blackstone's Commentaries, with which the framers of our Constitution were so familiar, clearly shows that the pendency of these preliminary proceedings was not regarded at the time of the adoption of the Constitution as a "charge in the regular course of judicial proceedings." Book IV, Chap. 23, entitled "Of the Several Modes of Prosecution," enumerates the only

methods he speaks of as "the manner of their (offender's) formal accusation," and, of course, does not include preliminary proceedings In Book IV, Chap. 22, preliminary proceedings are under consideration, and he concisely says that the commitment in which they culminate in default of bail "is only for safe custody" (p. 300 of Tucker's Edition, Vol. 5).

He adds, concerning detention after commitment (*Id.*):

> "But this imprisonment, as has been said, is only for safe custody, and not for punishment; therefore in this dubious interval between the commitment and trial, a prisoner ought to be used with the utmost humanity; and neither be loaded with fetters, or subjected to other hardships than such as are absolutely requisite, for the purposes of confinement only; though what are so requisite must too often be left to the discretion of the jailers who are frequently a merciless race of men, and by being conversant in scenes of misery, steeled against any tender sensation."

The English common law practice authorized removal only after indictment found, as is pointed out by Judge Brown, in his historical review of preliminary proceedings, in

In re Dana, 68 F. R., 886 at 893; where he said:

> "By the common law practice and by the state practice, the defendant, *if within the state or kingdom, was arrested upon a bench warrant, or a warrant signed by a justice of the peace, issued directly upon the finding of the grand jury. The bench warrant ran throughout the state or kingdom;* a justice's warrant had to be "backed or endorsed, by a justice in the *county where the defendant was found.* 1 Chitty Cr. Law, 342, Code Crim. Proc. N. Y., Section 304."

It will furthermore be remembered that oppressive removals to the mother country for trial for alleged crime, was one of the grievances specifically set forth in the Declaration of Independence:

> "For transporting us beyond seas to be tried for pretended offences."

See

Friedenwald: The Declaration of Independence (1904), pp. 249-250;

Winsor: Narrative and Critical History of America, Vol. VI, p. 53;

Bancroft: History of the U. S. (1857 Ed.), Vol. VI, 417-418, 441, 450-1.

and it seems quite unreasonable to suppose that the colonists intended to open the door to such oppressive removals as would be involved in rendition on mere complaints to distant states, to answer indictments that might never be found. Chancellor Walworth in Jack vs. Martin, 14 Wendell, 507 at 525, said:

> "But I must still be permitted to doubt whether the patriots of the revolution, who framed the Constitution of the United States and who had incorporated into the Declaration of Independence, as one of the justifiable causes of separation from our mother country, that the inhabitants of the colonies had been transported beyond seas for trial, could ever have intended to sanction such a principle as to one who was merely claimed as a fugitive from servitude in another State."

While it is true, as pointed out by the Circuit Court of Appeals below, that the precise question as to the sufficiency of such complaints as the basis of interstate rendition was never directly consid-

ered, pro or con, in any reported case, it is submitted that the aforementioned authorities and others, to be presently considered, sustain appellant's contention. In fact, no case has been decided by this Court, in which the sufficiency of a mere complaint for such purposes has been sustained, and few reported cases have arisen in any Court in which rendition was sought on a mere complaint.

Almost immediately after the adoption of the Constitution, a controversy arose between the States of Virginia and Pennsylvania which shows how jealously the rights of the individual were viewed. The incident led to the passage in 1793 of the Act of Congress now found as Rev. St., Section 5278, President Washington having transmitted the correspondence in the case to Congress, together with an opinion on the subject by Attorney General Edmund Randolph; the entire message is printed in full in the *American State Papers* (folio, edited by Lowrie & Franklin, 1834), Vol. 20, p. 41, and the relations of this correspondence to the statute were referred to by this Court in Kentucky vs. Dennison, 24 Howard, 66, at pp. 104-5. An indictment was there involved as the basis of the demand, but other objections to rendition were urged, and the whole question was fully considered. The Governor of Virginia, Beverly Randolph, in his message, said as to the constitutional provision:

> "A *charge*, in the sense here used, must be *such an accusation as of itself furnishes a sufficient evidence of guilt to put the accused upon his trial, or to justify his immediate punishment*. It cannot be an accusation founded upon a mere suspicion; it must be founded on some judicial act."

Edmund Randolph, as Attorney General of the

United States, said on this same occasion (*Id.*, p. 41):

> "*He must be charged. This term is sufficiently technical* to exclude any wanton or unauthorized accusation from becoming the basis of the demand. *It would, in the language of mere legal entries, be applicable where a bill had been found by a grand jury.* It must be interpreted under the Constitution, as at least requiring some sanction to be given to the suspicion of guilt by a previous investigation. In the present instance, a grand jury convened before two of the justices of the Supreme Court of Pennsylvania have made it and thus have *furnished a ground for bringing the foregoing persons* to a *formal trial.* Should such a procedure as this be declared to be incompetent as a charge, the object of this article in the Constitution must be either defeated or be truly oppressive."

It will be observed that Mr. Randolph here points out that the word "charged" is used in its technical sense, and also refers to the "formal trial," distinguishable from "preliminary proceedings."

POINT II.

Gross hardship, entirely unnecessary, would result from permitting rendition on mere complaint before a committing magistrate.

Obviously the purpose of the removal, possibly thousands of miles, is not merely for the purpose of having a hearing to determine whether probable cause exists to bind defendant to await the action of another tribunal. The phrase of the constitu-

tional provision "State having *jurisdiction* of the crime" clearly negatives this, and shows that the rendition is for purposes of final trial only. But, as is pointed out in the authorities already cited, an indictment may possibly not be found at all. Meanwhile, however, on appellee's contention, defendant must be delivered up and physically removed, possibly thousands of miles, without any right to bail, when ultimately no "charge" which he must answer will be preferred against him.

It is too clear for argument that the constitutional provision requires actual physical surrender and removal, and that bail is not authorized after an unreviewed warrant of extradition has been issued. Such are the authorities as to bail in interstate rendition at this stage:

Ex p. Erwin, 7 Texas App., 288.
Matter of Foye, 21 Washington, 250.

Of course, bail is authorized while proceedings superseding or delaying surrender are actually pending in the remanding State:

N. Y. Code of Crim. Procedure, Section 831 (the Field Code, adopted in so many States).
State vs. Hufford, 23 Iowa, 579.
Roberts vs. Reilly, 116 U. S., 80, 90, constantly followed in the Federal Courts.
Compare Hawley on International Extradition, p. 59.
Wright vs. Henkel, 190 U. S., 40.
In re Ah Tai 125 F. R., 795.

The English common law made most ample provision for bailing in the County of arrest, even

where an indictment was found in another County.

Rex vs. Bomaster, 1 Wm. Bl., 233.
Rex vs. Jones, 1 B. & Ald., 209.
Rex vs. Braithwait, 2 Lewin C. C., 55.
Rex vs. Brooker, 22 Dowl. Rep., 446.

Surely, where such gross oppression must result, removal on mere complaint before a committing magistrate was not designed by the framers of the constitution.

This is in singular contrast to the methods of federal removal for crime against the United States, established almost coincidently with the framing of the Constitution by the Judiciary Act of 1790 (now Rev. St., 1014). This provides not merely an examination upon the complaint to ascertain the existence of probable cause at the place of arrest, and authority to give bail there, to answer any indictment that may be found in the other district, but under approved practice authorizes the District Judge to exact a copy of an indictment found, before directing removal, so that removal shall not take place while it is in doubt whether an indictment will be found. This practice, in vogue in New York City, is referred to and sanctioned by the Circuit Court of Appeals in

Price vs. McCarthy, 89 F. R., 84, 88:

> "In exercising the authority conferred by statute, *the officers named have wisely insisted generally that it should be made to appear* that criminal proceedings in some form have been instituted against the offender, within the district where the offence is triable, and *usually that an indictment has been found against him;* but Chief Justice MARSHALL in Virginia com-

> mitted Aaron Burr for trial in Ohio, after a hearing before him as committing magistrate, for an offence committed in another district, although no proceedings had been instituted in Ohio."

(There were no hardships as to removal there, bail being furnished.)

This practice of requiring an indictment before ordering removal was specifically approved by Congress with respect to violation of the Bankruptcy Law in Section 10 of that Act.

In either event, there is no such serious hardship there, for bail is commonly given and always allowed except for capital offences in federal removal.

Rendition on mere complaints for indictable offences is unnecessary, and answers no useful purpose, but, on the contrary, creates gross hardship and oppression. Compare Sir Wm. Blackstone's humane language, quoted, *supra* (p. 12). It also runs counter to the principle laid down in

Beavers vs. Henkel, 194 U. S., 73 at 83,

by Mr. Justice BREWER in delivering the opinion of the Court:

> "It may be conceded that no such removal should be summarily and arbitrarily made. There are risks and burdens attending it which ought not to be needlessly cast upon any individual. We must never forget that in all controversies, civil or criminal, between the government and an individual, the latter is entitled to reasonable protection."

In People *ex rel.* Lawrence vs. Brady, 56 N. Y., 186, Judge ANDREWS, speaking for the Court, after pointing out under the very constitutional provision here involved, that

> "The question of his (defendant's) guilt or

> innocence is wholly irrelevant in determining the action of the executive of the State upon which the demand is made. That question is to be investigated and determined by the Courts of the State where the alleged crime was committed,"

added, in a case where rendition was sought on a mere affidavit, the point not being made that preliminary proceedings will not authorize removal, and it not appearing whether final trial was or was not there authorized on this affidavit:

> "It cannot be held that any less degree of certainty is admissible in an affidavit charging the conspiracy than is required in an indictment for the same offence. If any distinction exists in this respect, the affidavit should be the more full and specific. It is usually the *ex parte* statement of the accuser. An indictment is found by a body standing indifferent between the parties, and charged upon oath to inquire of offenses and which is supposed to act upon competent proof in finding the bill."

Wm. H. Seward, while Governor of New York, also emphasized the hardships attending rendition on mere affidavits (Seward's Works, Vol. II, p. 528; note, also, Mr. Thornton's experiences quoted *supra*, p. 9). See, also, 6 Pa. Law Journal, 413 (1847), where the following language is used:

> "Though the Act of Congress, as has been already seen, gives the election of supporting the requisition either by affidavit or indictment, yet there has been a growing jealousy of the former course, and an increased disposition to regard the latter as not only the safer but the most certain method of accomplishing the object. The records of the several States are full of instances where warrants have been refused in consequence of the informality of the

> accompanying affidavits; and whenever flaws can be picked in the stating of the offence, when thus set forth, both Courts and governors have not hesitated to consider them as substantive and fatal defects."

Interstate rendition thus differs from federal removal, not merely in requiring physical removing in lieu of bailing, but also in requiring the same without any ascertainment of probable cause, if removal on a mere affidavit before an examining magistrate be authorized.

Some recent observations of Judge CULLEN, in the opinion of the Court of Appeals in

> People *ex rel.* Corkran vs. Hyatt, 172 N. Y., 176, 182, 187,

are also very much in point:

> "The condition of a citizen of one State surrendered to another for criminal prosecution has not the safeguards which exist in international extradition, for the surrendering State is without any standing to intervene in his behalf, however much its process may be abused. * * *
>
> There is great danger that citizens may be carried into other States to be punished for acts, which are not criminal in the jurisdiction in which they were committed. The case of false pretenses is a notable example. By our Penal Code (Sec. 544), it is provided that a purchase of property by means of a false pretense is not criminal, where the false pretense relates to the purchaser's means or ability to pay, unless the pretense is made in writing and signed by the party to be charged. *This was doubtless dictated by the knowledge that criminal charges of false pretenses are often instituted in reality to compel the payment of debt, and are easily fabricated.* * * * The real evil of the day is not the insufficiency of the

criminal laws, but the excessive multiplication of statutory crimes."

POINT III.

All our States provide methods of arrest and detention of fugitives from justice before the Governor's warrant of extradition issues.

The suggestion of the Court below, that

> "Congress recognized the fact that exigencies frequently arise where it is impossible to procure an indictment in time to prevent the escape of the offender, and hence provided the alternative method of procedure"

will be considered further *post* in connection with a discussion of Rev. St. 5278, designed to show that the alternative phrase "*affidavit charging crime*" was designed merely to embrace "informations" and such other formal charges of crime as are authorized in the States as the basis of the actual *trial*.

The argument that rendition based on affidavits may be necessary to prevent escapes in the jurisdiction of remand, pending the finding of an indictment, ignores the fact that every State of the Union has provided a system of ancillary proceedings against fugitives from justice for their commitment or bailing until the Governor's warrant issues. This ancillary system meets these needs, and is referred to in this very opinion below (at p. 331) with reference to Sections 829 and 830 of the N. Y. Criminal Code covering this very ground, which the Court below describes as

> "a wise provision to prevent the escape of crim-

inals pending the arrival of extradition papers from distant States."

This provision is met with in all the States that have adopted the Field Criminal Code, as also in others, where it was independently enacted. Moreover, successive preliminary examinations may be had, if necessary. Even before special statutes were enacted on this subject, such preliminary arrest was sustained (Am. & Eng. Ency. of Law (2nd Ed.), Vol. XII, pp. 600, 607). It involves no gross hardship, however, as it does not take defendant out of his State before indictment found, affords opportunity for a hearing as to probable cause, and permits of bailing in the interim, until the Governor's warrant of extradition issues, after indictment.

Among the numerous authorities that have sustained such ancillary state statutes before the Governor's requisition is obtained, fully collected in the above cited article in the Am. & Eng. Ency. of Law, are:

Ex p. State, 73 Ala., 503, 508.
Robinson vs. Flanders, 29 Ind., 10, 14, 15.
Comm. vs. Tracy, 5 Metc., 536, 546, 551 (Chief Justice SHAW).
Ex p. Ammons, 34 Ohio St., 518.
Ex p. Cubreth, 49 Col., 436.
Ex p. Rosenblatt, 51 Cal., 285.
Kurtz vs. State, 22 Fla., 36, 41.
Ex p. White, 49 Cal., 433.

See also

Holmes vs. Jennison, 14 Peters, 540, 547 (Mr. Justice CATRON).
Matter of Strauss, 126 F. R., 327-331 (C. C. A.).

Moore vs. Peo., 14 Howard, 13, limiting *dicta* of Prigg vs. Comm., 16 Peters, 539.

See also the numerous authorities sustaining arrest and detention of fugitives from justice, until the Governor's warrant issues, even without statute, collected in Am. & Eng. Ency. of Law (2nd Ed.), XII, p. 607.

There is no public interest that requires going beyond this procedure and requiring actual removal before the ultimate "charge" has been filed.

POINT IV.

The words "charged with treason, felony or other crime" were, it is submitted, used by the framers of the Constitution in the same sense as that in which analogous words are elsewhere used in the same instrument concerning criminal proceedings, and are inapplicable to preliminary examinations.

Article III, Sec. 2, Subd. 3, providing that

> "The trial of all crimes, except in Cases of Impeachment shall be by jury; and such trial shall be held in the State where the said Crimes shall have been committed, etc."

obviously does not apply to preliminary proceedings, and shows that such were not in contemplation in connection with "charges" of crime.

Obviously the Fifth Amendment does not, either, which provides that,

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury; etc."

On the contrary, reading Article IV, Sec. 2, Subd. 2 in connection with this Amendment, and giving proper force to the latter as a later amendatory limitation on *federal* action, *it is difficult to see why this Amendment does not prevent removal on mere preliminary accusation for infamous offences.* Interstate rendition contemplates federal action (*Ex. p.* Siebold, 100 U. S., 371, 391).

The further provision of the same Amendment

> "Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb"

has also, of course, been held to be inapplicable to preliminary proceedings.

So also the Sixth Amendment.

See

Ex p. Milligan, 4 Wall., 2.
Ex p. Wilson, 114 U. S., 417.
Ex p. Bain, 121 U. S., 1.
In re Dana, 7 Benedict, 1.

As said by Mr. Justice MILLER in *Ex p.* Bain, *supra*, in delivering the opinion of this Court (p. 12):

> "It remains true that the grand jury is as valuable as ever in securing, in the language of Chief Justice SHAW (in the case of Jones vs.

> Robbins, 8 Gray, 329), 'individual citizens from an open and public accusation of crime and from the trouble, expense and anxiety of a public trial before a probable cause is established by the presentment and indictment of a grand jury; and, in case of high offenses, it is justly regarded as one of the securities to the innocent against hasty, malicious and oppressive public prosecutions.'"

In short, it seems apparent that in none of the provisions concerning charges of crime, did the framers of the Constitution have in mind, preliminary proceedings, which are merely modifications of the ancient methods of arrest and detention without warrant on alleged commission of crime, till indictments or informations can be filed, and that these were not the "charges" of crime for which rendition was contemplated to the "State having jurisdiction of the crime."

It is, of course, well settled that there need be no jury trial in preliminary proceedings; that they are not the basis of the plea of *res adjudicata*, but that successive proceedings on the same claim are authorized, and that they are required to be held in the district of arrest, and not in the place where the crime is claimed to have been committed, and that they do not constitute a "trial."

> Encyclopedia of Pleading & Practice, Vol. 16, p. 821.
>
> Price vs. McCarthy, 89 F. R., 84, 86 (CCA).
>
> *In re* Dana, 68 F. R., 886.
>
> U. S. vs. Lumsden, 1 Bond (U. S.), 15, 26 Fed. Cases, 15641.
>
> Gruch vs. People, 3 Parker's (N. Y.), Crim. Rep., 114.

In Bishop's New Crim. Procedure, Vol. I, Sec. 239a, it is well said:

> "The preliminary examination is not necessary, being a mere expedient to prevent the suspected persons from escaping, or for preserving the evidence, or keeping the witnesses within control."

Matter of Garst, 10 Nebraska, 78.
Lattimer vs. State, 35 Nebr., 609.
Hamilton vs. People, 29 Mich., 173.
Cox vs. Coleridge, 29 Mich., 143.
Ex p. Porter, 16 Texas Appeals, 321.
State vs. Britton, 18 Vroom (N. J.), 251.

In Hamilton vs. People *supra*, CAMPBELL, J., on behalf of a bench which included Judge COOLEY, concurring, said:

> "The Justice in these examinations, does not act judicially in the technical sense, but in his capacity of a conservator of the peace."

In State of Missouri vs. Powell, 44 Mo. App., 21, 24, the Court said:

> "When the complaint was filed by Haseltine, the Justice had authority to issue a warrant for Powell's arrest but he could not be placed on trial, neither could it be said that there was a prosecution against him until there was an information filed by the proper officers."

(2) Preliminary proceedings not being essential to a prosecution for crime, it is submitted that they do not constitute such charge of crime "in the regular course of judicial proceedings," as this Court, speaking by Chief Justice TANEY, in Kentucky vs. Dennison, said must underlie the demand under this very article of the Constitution.

This Court, has of course, repeatedly considered the character of preliminary criminal examinations. In Benson vs. McMahon, 127 U. S., 457, by BLATCHFORD, J., it said:

> "We are of opinion that the proceeding before the commissioner is not to be regarded as in the nature of a final trial, by which the prisoner could be convicted or acquitted of the crime charged against him, but rather of the character of these preliminary examinations, which take place every day in this country, before an examining or committing magistrate, for the purpose of determining whether a case is made out which will justify the holding of the accused, either by imprisonment or under bail, to ultimately answer to an indictment or other proceeding, in which he shall be finally tried upon the charge made against him."

In Thiede vs. Utah, 159 U. S., 510, 513, this Court speaking through Mr. Justice BREWER, said:

> "A preliminary examination is not indispensable to the finding of an indictment or the trial thereon, and if the examination itself is not indispensable, it would seem to follow that no step taken in the course or as a part of it can be."

In U. S. vs. King, 147 U. S., 672, 685, Mr. Justice BROWN, speaking for this Court, said:

> "The record proper begins with the indictment or information and ends with the sentence and commitment. The proceedings before a commissioner are principally for the information of the District Attorney."

(3) In Virginia vs. Paul, 148 U. S., 107, *supra*, as already pointed out, this Court held that criminal proceedings do not begin when preliminary

proceedings are instituted. That the Court was considering their general nature and character and not merely construing the particular federal statute *there involved* is apparent from Mr. Justice BREWER's statement (p. 119), that the only exception recognized by the authorities, deals with the question whether their institution bars the running of the Statute of Limitations. As to that question, it must be conceded that the authorities are conflicting, though the weight of authority is to the effect that they do not, especially not under the federal statute.

Commw. vs. Haas, 57 Pa. St., 443.
In re Griffith, 35 Kans., 377.
City of Pilot Grove vs. McCormick, 56 Mo. App., 530.
Boughn vs. State, 44 Neb., 889.

Under the federal statute:

U. S. vs. Vondersmith, quoted in Wharton's Am. Cr. Law, 6th Ed., Sec. 436, note.
Ex p. Lacy, 6 Oklahoma, 4.
Instructions of U. S. Attorney General in 1894, cited in Pierson's Precedents applicable to Administration of the Pension and Bounty Land Laws (Gov. Printing Office, 1895).

In fact the federal statute (Rev. St., Sec. 1044), p. 19, originally enacted as part of the Judiciary Act of 1790 (1 Stat., at L. 119), which provided

> "Nor shall any person be prosecuted, tried or punished for any offence not capital, nor for any fine or forfeiture under any penal stat-

> ute, *unless the indictment or information* for the same shall be found or instituted within two years from the time of committing the offence," etc.

is itself strong contemporary evidence that the framers of the constitution did not regard a criminal charge as pending, merely because preliminary proceedings before a committing magistrate, as distinguished from indictment or information, had been instituted.

(4) It is further submitted that the word "charge" in Article IV, Sec. 2, subd. 2, where it is connected with the phrase "to be removed to the State *having jurisdiction of the crime*," is used in the same sense in which the framers of the Constitution, in Article III defined "cases" within the "judicial power of the power of the United States" to be "vested in one Supreme Court and in such inferior Courts as the Congress may from time to time establish," and that the former should be construed in the same manner in which the latter have been defined, as *excluding mere preliminary examinations before mere committing magistrates acting as conservators of the peace.*

> Robertson vs. Baldwin, 165 U. S., 275, 278-280.
> Todd vs. U. S., 158 U. S., 278.

POINT V.

Revised Statutes 5278 as construed, and the cases under it considered.

As already pointed out, the controversy between Virginia and Pennsylvania of 1791 led to the passage of the Act of Congress of Feb. 12th, 1793 (1

Stat., at L. 302), now Rev. St., 5278. The principal purpose of the statute was to remove the argument that the constitutional provision was not self-executing, but required legislation. As pointed out by Chief Justice TANEY, in Kentucky vs. Dennison, the practice in vogue under the Articles of Confederation was continued, of looking to the executive official of the State of refuge, to direct the delivery of the fugitive, though in as far as this very federal act threw a mandatory obligation upon a State official, not exacted in the Constitution itself, it is unconstitutional (Prigg vs. Commonwealth, 16 Peters, 539, at 616, 620, Kentucky vs. Dennison, *supra*, *Ex p.* Seebold, 100 U. S., 371, 391; compare Robertson vs. Baldwin, 165 U. S., 275, 278, 280). The theory that delivery up was authorized only through executive action in the State where the fugitive was found, has been ascertained, as regards our colonial period, to be historically inaccurate (Moore on Extradition, Vol. II, Sec. 517-519).

Upon proceeding to legislate on this subject, Congress was confronted by the fact that many minor offences were at this very time triable both in England and in the States without indictment, and the provision of the Judiciary Act of 1790 as to limitations already cited, in terms recognized procedure by "information" in appropriate cases.

Ex p. Wilson, 114 U. S., 417.
Mackin vs. U. S., 117 U. S., 348.
Callan vs. Wilson, 127 U. S., 540.
Hurtado vs. California, 110 U. S., 516.
Blackstone's Commentaries, Book II, Ch. 23.
Quincy's Mass. Colonial Reports, 178 (1765).

The only limitation upon informations, in cases not triable by indictment, was that they must be upon oath of persons having actual knowledge, and that a mere statement of charge upon the oath of office of a prosecuting officer does not suffice, but must be accompanied by *affidavits* from persons having actual knowledge.

U. S. vs. Tureaud, 20 F. R., 621.
Ex p. Lane, 6 F. R., 34, 38.
In re Dana, 68 F. R., 886, 894-5.
U. S. vs. Polite, 35 F. R., 58.
Johnston vs. U. S., 87 F. R., 187 (C. C. A.).
Compare Rice vs. Ames, 180 U. S., 371, 374-5.
Beavers vs. Henkel, 194 U. S., 73, 87.

In United States vs. Tureaud, *supra*, we find a valuable historical review of the law as to "Informations," followed and applied in the later cases, particularly by the Circuit Court of Appeals in the Johnston case. An "information" was there challenged, because based only on an affidavit of *belief* as to its truth. Judge BILLINGS says:

> "The point, and the sole point, to be passed upon is whether this affidavit furnishes such a 'probable cause,' and is supported by such an oath, as is required by the fourth amendment to the constitution. It is true, it is an affidavit subjoined to and made the basis of an information. It is also true that under the usages of the government of Great Britain this information belongs to the class of formal accusations which could be made by the King in his courts without any evidence and against all evidence. But the adoption of the fourth amendment affected all kinds and modes of prosecution for crimes or offenses, for there can be no legal pursuit of accused persons without

> apprehension. * * * All arbitrary informations, all informations which spring into existence simply because the King and his attorney elected to present them, indeed *all informations, except those supported by proof upon oath, which constitute probable cause, by this constitutional provision were expunged from permissible procedure.*"

In support of his conclusion that the supporting affidavit must contain facts within the personal knowledge of affiants, Judge BILLINGS quoted the language of this Court in *Ex p.* Burford, 3 Cranch, 453:

> "The judges of that Court were unanimously of opinion that the warrant of commitment was illegal for want of stating some *good cause certain, supported by affidavit.*"

and also Mr. Justice BRADLEY's language (3 Woods, 502):

> "In other words, the magistrate ought to have before him the oath of the real accuser, presented either in the form of an affidavit or taken down by himself on a personal examination exhibiting the facts on which the charge is based, and on which the belief or suspicion of guilt is founded."

In providing for rendition for crimes, ultimately triable otherwise than by indictment, Congress looked to the substance of the "information," the the affidavit of charge, and not merely the formal information, therefore, in enacting what is now Rev. St. 5278.

Varying names were and might in the future be expected to be given by the different States, to these authorized substitutes in certain cases for "in-

dictments," the name by which the formal charges on which the actual trial took place, known to the common law, having been "informations," and frequently the same varying names were also applied to the accusations on which mere preliminary examinations took place.

As said in the Ency. of Pleading and Practice, Vol. X, page 353:

> "Informations or complaints, or affidavits in the nature of informations or complaints, are used in criminal procedure before justices of the peace and other inferior Courts exercising like jurisdiction, both where the justice of the peace acts as a conservator of the peace in the examination and commitment of persons charged with crime, and where he, or such Court as exercises the same jurisdiction, acts upon the affidavit, information or complaint in the trial and punishment of the persons charged."

It was certainly not the purpose of Constitutional Convention or Congress, which had expressly provided for rendition for all crimes, no matter how petty (Kentucky vs. Dennison, *supra*), to require the States to change, their criminal procedure by resorting to indictment exclusively, even for non-indictable offenses, in order to secure rendition (*Ex p.* Reggel, 114 U. S., 642; Beavers vs. Henkel, 194 U. S., 73, 84), and to prohibit surrender on "informations" properly charging non-indictable crimes, and hence Congress was, of course, called upon to provide for surrender on "informations," by whatever name known, and not merely on "indictments."

This Congress did in the Act of 1793, now Rev.

St. 5278, providing that the demand shall be accompanied by a

> "copy of an *indictment* found, or an *affidavit* made before a magistrate of any State or Territory, as aforesaid, *charging* the person so demanded with having committed treason, felony or other crime."

The affidavit referred to must be an affidavit "*charging*" crime. Congress took care here to repeat the constitutional word, which has been construed by both Attorney General Edm. Randolph and the Attorney General of Virginia, as being employed in a "technical" sense, as requiring a charge "in the regular course of *judicial* proceedings." It was furthermore mindful of the constitutional limitation placed upon any warrant that might be issued under its mandate (4th Amendment),

> "no warrants shall issue, but upon probable cause, supported by oath or affirmation."

The statute therefore clearly expresses the legislative intent that a substantial "information" of charge, however, it might be styled, and not resting merely on aborrent oaths of office, but on the "oath" by affidavit required by the Constitution, should alone justify rendition in appropriate cases, and the Act of Congress does not indicate any intention to authorize removal on mere affidavits filed as the basis for preliminary examination.

The words "indictment" and "affidavit" charging crime, are used distributively, just as they are used in the similar provisions of the Judiciary Act of 1790, as to Statutes of Limitations for crimes, as held by this Court

Mackin vs. U. S., *supra*.

and were not designed to authorize the substitution of an "affidavit" charge, for offences triable by the State Law only on indictment. As said by this Court in

Mackin vs. United States, *supra*, as to such grouping of the words "indictment or information":

> "(It) does not undertake to define which of these crimes and offences are infamous, and, therefore, not to be prosecuted by information, but leaves that to be regulated by the paramount authority of the Constitution. * * * *The including, in a single clause, of two classes of offences, one of which may be prosecuted by information, is a sufficient reason for mentioning informations as well as indictments, without attributing to Congress an intention that both classes should be prosecuted by information*" (117 U. S., 348, 353, 354).

The decision of Mr. Justice BLATCHFORD in

In re Dana, 7 Benedict, 1,

approved of and followed by this Court in

Callan vs. Wilson, 127 U. S., 540,

is direct authority for the proposition that removal should not be authorized, where the pending proceeding does not provide for jury trial in cases where that is a right, even though (in that case, but not here, on a charge of felony), trial *de novo* after conviction, before a jury in another Court be provided for, and the circumstances that federal removal as distinguished from interstate rendition was there involved, is immaterial.

The Circuit Court of Appeals below (126 F. R., 327), not only felt bound, in view of the limitations

upon its jurisdiction, to ignore the constitutional argument entirely, but entirely overlooks the fact that all crimes are not finally triable by "indictment," but that "informations" ("affidavits of charge in a Trial Court"), have been authorized for the trial of offences not infamous for centuries past, and that scope and effect may be given to these words in the statute without making them equivalent to "complaints in preliminary hearings," and without construing the statute as prescribing a "mere alternative method of procedure," a position condemned by this Court in the Mackin case.

The Court below refers to the language used by this Court in

Ex p. Reggel, 114 U. S., 643,

in which it points out that an indictment only was involved, but overlooks the fact that this Court does not, in paraphrasing the statute, refer to an affidavit in preliminary proceedings, but that this Court's language is fully satisfied by a reference to "affidavits" of formal charge in a Trial Court.

It will, furthermore, be noticed that neither of the two cases cited by the Court below on this point (*In re* White, 55 F. R., 55, Kingsbury case, 106 Mass., 223) involved the precise point here raised, and that neither of the authorities cited by Prof. Moore in his work on Extradition (II Sec. 546), referred to by the Circuit Court of Appeals, sustains his statement in his text.

The fact that the point may not heretofore have been urged, and has, therefore, not been decided pro or con, heretofore, is no valid argument against appellant's contention (*Ex p.* Wilson, *supra*. Boyd

vs. U. S., 116 U. S., 616), but it should, on the other hand, be remembered that mere complaints before committing magistrates have seldom been made the basis of rendition proceedings, and that they have very seldom come before the Courts for consideration, as also that the reported opinions of Courts and State executives show that they are viewed with extreme disfavor, though the point here urged would probably not have been received with much favor before this Court overruled the line of cases considered in Virginia vs. Paul, *supra*, in 1893.

Several propositions concerning Rev. St., 5278, are however established by the decisions, besides those already considered, to the effect that the charges must be made "in the regular course of judicial proceedings."

The affidavit of charge must itself be produced, and an affidavit merely averring that defendant is charged in the other State is not sufficient.

State vs. Kufford, 28 Iowa, 391.
Smith vs. State, 21 Nebraska, 552.
Forbes vs. Hicks, 27 Nebraska, 111, 116.
Ex p. Pfitzer, 28 Ind., 450.
Ex p. Lorraine, 16 Nevada, 63.
Ex p. White, 49 Calif., 435.

Says the Court in *Ex p.* Pfitzer, *supra:*

> "A copy of the affidavit must be produced before the governor of a State is authorized, upon the requisition of the governor of another State, to issue his warrant for the arrest of the fugitive."

In State vs. Hufford, *supra*, it was said:

> "A charge of the crime against the person to be arrested and delivered up must be made in

the State where the offense was committed. *This charge must be made* to some court, magistrate or officer, *in the form of an indictment, information or other accusation, known to the law of the State* in which the offense was committed. We conclude, therefore, that unless the accused in this case was so charged, the magistrate had no jurisdiction. * * * The evidence upon which this case was tried contains no proof that the accused was *charged* with the crime in Illinois, where it is alleged to have been committed. The jurisdiction of the magistrate is neither averred in the complaint or information, nor shown by the evidence; it cannot be presumed. We must regard the proceedings, therefore, as void."

In *Ex p.* Powell, 20 Florida, 807, the Court said:

"It is well known that in every State persons who are not magistrates are empowered to certify the acknowledgment of deeds and to administer oaths, and so it cannot be presumed that because an oath is taken the person certifying it is a judicial officer, and that it is taken in the course of administration of justice in a criminal prosecution. The act of Congress is explicit that the 'charge' must be made before a magistrate and the demand of the fugitive must be made by the executive authority in aid of the judicial authority in administering laws for the punishment of crime. * * * There is here no legal presumption that a criminal prosecution was commenced before a magistrate or court, from the fact that an assertion was made on oath that a crime had been committed. Such affidavits are made in civil suits as all lawyers well know, and before notaries and commissioners for various purposes other than the prosecution of criminals. Extrajudicial affidavits also are often made and sometimes for mischievous purposes."

In State vs. Richardson, 34 Minn., 115, the Court said, holding that a warrant of extradition is void which recites that it is based on a "complaint" and does not use the term "affidavit":

> "An indictment or an information embodies a criminal charge or accusation by a grand jury or by an officer acting under the sanction of an oath pursuant to law; but if the charge is not made in that form, then it must affirmatively appear to have been made by affidavit. Such affidavit must, of course, be in writing and duly certified by the magistrate before whom made. It may be conceded that a complaint is the initial proceeding in criminal prosecutions and examinations before magistrates, and that such complaint is required to be upon oath. Campbell vs. Thompson, 16 Me., 117. It may also, by itself, if the statement of the criminal charge be sufficient, constitute an examination so as to authorize the issuance of a warrant. State vs. Nerbovig, 33 Minn., 470. And if a jurat be attached, and it is properly certified by the magistrate, as is frequently the case, in practice, it will be essentially an affidavit. But a complaint is not necessarily an affidavit, nor are they in legal practice or contemplation understood as convertible terms. For, though a complaint may be reduced to writing and subscribed, it need not necessarily be certified by the magistrate, for the fact may otherwise appear by his records. And so a complaint may be merely formal, and made or entered by one who has but little, if any, knowledge about the facts and the examination consist of the deposition of other witnesses—State vs. Armstrong, 4 Minn., 251—while an affidavit, as the term is ordinarily used in such cases, is understood to be a sworn statement of facts or a deposition in writing, and to include a jurat, which means a certificate of the magistrate showing that it was sworn to before him,

> including the date and sometimes, also, the place."

In *Ex p.* Pearce, 32 Tex. Crim. App., 301, 305, the Court seems to have adopted the construction here contended for in incidentally construing the constitutional provision:

> "*An examination of the Constitution shows that where a person is charged—that is, in due course of legal procedure of the particular State, or to use the language of the statute, where there is an indictment found charging a person*—with having committed a crime, and he is a fugitive from justice, he should be surrendered on demand of the executive of the State from which he fled."

Some vicious unintended results of such overliteral construction as that adopted by the Circuit Court of Appeals below, are brought to light by the class of cases concerning attempted rendition on informations, a most important matter in these days, when informations under constitutional amendments are more and more frequently being substituted for indictments, and the grand jury abolished. High authority is to be found to the effect that this does not suffice, to secure rendition.

Ex p. Hart, 63 Fed. Rep., 249, 259 (CCA).

But see directly to the contrary:

In re Hooper, 52 Wisconsin, 699.

People vs. Stockwell, 97 North Western, 765 (Minn.).

In re Van Scriever, 42 Nebraska, 772, 778-780.

Such tendency towards over-literal construction, which the same Circuit Court of Appeals deprecates

in another recent case (U. S. vs. Dominci, 78 F. R., 334, 337, CCA), moreover leads to the absurd result that rendition would be authorized in preliminary proceedings, where an affidavit of charge is employed, but would not be where the proceeding is pending in the higher Trial Court on *information*.

POINT VI.

In view of the authoritative decisions construing the term "fugitives from justice" as describing all persons in the demanding State at or about the time of the commission of the offense, charged with committing it there, defendants are frequently only "fugitives from justice" by construction, and their removal is sought to States other than that of their domicile.

Roberts vs. Reilly, 116 U. S., 80, 197.
Streep vs. U. S., 160 U. S., 128.

POINT VII

In the light of the foregoing authorities, therefore, it is respectfully submitted that the first question certified should be answered in the negative. As to the second question, it is submitted that it is based upon an incorrect construction of Revised Statutes, Section 5278, making it authorize rendition on a mere complaint before a committing magistrate. (Matter of Strauss, 126 Fed. Rep., 327.) It is submitted that this is an erroneous construction of the statute, and that the statute, correctly construed in the light of the constitutional provision, does not authorize such rendition and is valid, but that, if the contrary be the correct construction of the Act, the same is violative of the Constitution, and in that event the question certified should be answered in the affirmative.

Respectfully submitted,

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Supreme Court

OF THE UNITED STATES,

OCTOBER TERM, 1904.

In the Matter of MORRIS STRAUSS. } No. 186.

SUPPLEMENTAL BRIEF FOR APPELLANT.

I.

Were it not for the fact that the brief for appellee seriously urges the claim (in Point III) that a system of State rendition may be established by State legislation, in cases and under conditions other than those provided for by Federal law, there would be little occasion to file this supplemental brief. A mere inspection of the brief of appellee shows that the alleged inconveniences and absurdities complained of result from a mere ignoring of the State statutes, providing for apprehension and bailing prior to issuance of the Governor's de-

mand, though the validity of these provisions is not challenged by the State. In fact, our argument on this point is considerably strengthened by the District Attorney's reference to Section 827 of the New York Code of Criminal Procedure, which paraphrases and construes the words "indictment found or affidavit made * * * charging the person demanded" in U. S. Rev. St., 5278, by means of the equivalent terms there employed:

> "*indictment or information* from the authorities of such other State or territory."

The suggestion of the learned counsel (footnote, page 32), that the term "information" is used here as defined in Section 145 of the same Code as the pleading before a committing magistrate, is obviously fallacious, for that section refers only to "informations" under the New York Practice, and naturally the foreign States referred to in Section 827 do not take their nomenclature from the New York Criminal Code; the section obviously refers to the common law substitutes for "indictments," authorized in cases not involving infamous crimes, and on a parity with indictments, which would otherwise not be provided for at all.

II.

The learned counsel for appellee herein, in claiming that the State of New York has established an independent and substitute method of rendition of fugitives from justice, is claiming an authority for State legislation which that State has never before asserted, which its lawmaking body has expressly and in terms disclaimed, and which its Courts, together with overwhelming additional ju-

dicial authority, have quite uniformly held to be unconstitutional.

Section 827 of the New York Code of Criminal Procedure, set forth on the brief for appellee (p. 32), is an amendment of the same section of the Act, originally enacted in 1881 (Laws of New York of 1881, Vol. II, Section 827). This is the famous "Field Criminal Code," which was drafted and reported to the State Legislature by Commissioners appointed for that purpose already in 1849. In their report of that year, this section (there numbered Section 897), bears the following suggestive annotation, inserted by the distinguished revisors, David Dudley Field, David Graham and A. Loomis:

> "Declaratory of the duty imposed upon the governor, by Article 4, Section 2, Subdivision 2 of the Constitution of the United States."

A statute merely declaratory of the Federal statute was thus designed by the drafters, not one authorizing surrender and shipment through other states, on grounds or papers insufficient to authorize such course under federal laws.

Nor is it difficult to find the reason for this sort of legislation. This Court had held that it was not competent for Congress to impose a mandatory duty on a State official as such with respect to rendition (Prigg vs. Commonwealth, 16 Peters, 539, 616, 620; Kentucky vs. Dennison, 24 Howard 66; *Ex p.* Seebold, 100 U. S., 371, 391; compare Robertson vs. Baldwin, 165 U. S., 275, 278, 280), and, accordingly it was in order for the law-making bodies of the States to create an obligation, where otherwise there might have been only a right. Moreover, further detailed regulation of the practice to be pursued by the State officials in carrying

out the federal statute, were established, in no way inconsistent with that law, and not aiming at establishing a substitute therefor, and these provisions are properly described as merely "in aid of the Congressional enactments" and to "provide proper and adequate means and facilities per the accomplishment of such extradition" (Spear on Extradition, pp. 309-312, quoting *Ex p.* Ammons, 34 Ohio St., 518).

It is, accordingly not strange, that none of the cases cited by appellee (Brief, pp. 23, 25-27) should have involved actual attempted surrender to another State and removal to another State, independently of the Federal Statute and that the passages quoted all relate to justification of mere arrest and detention or bailing, prior to the issuance of a Governor's warrant under the Federal Statute, and in aid thereof.

A state statute which provides not merely for arrest and detention until the Governor's demand under the federal law, but for independent surrender and transportation of prisoners from one state to another, demanding, state, through the territory of still other states, is condemned by overwhelming authority as unconstitutional, because:

1. The Federal Constitution and Statute established an exclusive method of surrender and transportation, invalidating any state legislation on such point.

2. Because inconsistent with and in contravention of Article 1, Section 10, Subdivision 3, of the Federal Constitution, providing

> "No state shall, without the consent of Congress, * * * enter into any agreement or

compact with another state or with a foreign power."

3. Because no state has jurisdiction to authorize the transportation of any person, involuntarily, into or through territory outside of its own boundaries, and no theory of "police power of a state can authorize such procedure, especially as no exercise of such power is involved in acts not amounting to mere expulsion, with respect to persons merely complained against, and not convicted of crime in a demanding state (People *ex rel.* Barlow vs. Curtis, 50 N. Y., 321, 330-1; People *ex rel.* Lawrence vs. Brady, 56 N. Y., 186).

A long line of authorities holds that a state statute attempting to provide for surrender of fugitives from justice from another state, on terms differing from the federal law, is unconstitutional, some of them (like *Ex p.* McKean, 3 Hughes, 23; 16 Fed. Cases, No. 8848), involving the question directly, and not merely by way of dictum.

It is conceded by opposing counsel (p. 23, note), that a state statute as to delivery up of fugitives from justice to a foreign country would be unconstitutional (U. S. vs. Rauscher, 119 U. S., 407, approving People *ex rel.* vs. Curtis, 50 N. Y., 321), but this overlooks the fact that the same constitutional provision that forbids such agreements with a foreign power, also forbids agreement between states, while in the latter case we have the further argument that there exists a federal grant of power as to interstate rendition, exercised by Congress, which eminent authorities, at least, have regarded as exclusive. The reasoning in People *ex rel* vs. Curtis is most convincing at every point. Among the numerous authorities holding a state

statute construed as contended for by appellees, unconstitutional, are

Holmes vs. Jemnison, 14 Peters, 540, 570-574.

Prigg vs. Comw., 16 Peters, 539, at 617-618, 620, 622-5.

Kentucky vs. Dennison, 24 How., 66, 104.

Roberts vs. Reilly, 116 U. S., 80, 94.

Hyatt vs. Corkran, 188 U. S., 691, affg.,172 N. Y., 176.

Malcolmson vs. Gibbons, 56 Mich., 459.

Commw. vs. Tracy, 5 Metc., 536, 550.

Kurtz vs. State, 22 Florida, 36, 42.

Ex p. McKean, 3 Hughes, 23; 16 Fed. Cases, 8848.

Ex p. Smith, 3 McLean, 121; 22 F. C., 12968.

Matter of Titus, 8 Ben., 411; 23 Fed. Cases, 14062.

Ex. p. Rosenblatt, 51 Cal., 285.

Cases cited in our main brief, page 22.

In Prigg vs. Commw., Judge STORY speaking for this Court, said of this very provision (pp. 617-618):

> "If this be so, then it would seem, upon just principles of construction, that the legislation of Congress, if constitutional, must supersede all state legislation upon the same subject and by necessary implication prohibit it. For, if Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that the State Legislatures have a right to interfere and, as it were, by way of compliment to the legislation of Congress to prescribe additional regu-

> lations, and what they deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress in what it does prescribe manifestly indicated that it does not intend that there shall be any further legislation to act upon the subject matter. Its silence as to what it does not do, is as expressive of what its intention is, as the direct provisions made by it."

See, accordingly,

The Roanoke, 189 U. S., 185, 197-9.

In Kentucky vs. Dennison, Chief Justice TANEY said (at page 104):

> "This duty of providing by law the regulations necessary to carry this compact into execution, from the nature of the duty and the object in view, was manifestly devolved upon Congress; for if it was left to the States, each State might require different proof to authenticate the judicial proceeding upon which the demand was founded."

In Roberts vs. Reilly, this Court, after quoting this passage, added:

> "It follows, however, that whenever the executive of the State upon whom such a demand has been made by virtue of his warrant, causes the arrest for delivery of a person charged as a fugitive from the justice, of another State, the prisoner is held in custody *only under color of authority derived from the constitution and laws of the United States*, and is entitled to invoke the judgment of the judicial tribunals, whether of the State or the United States, by the writ of *habeas corpus*, upon the lawfulness of his arrest and imprisonment."

The recent case of Hyatt vs. Corkran, holding

that persons who are merely constructively "fugitives from justice" cannot be extradited, in view of the Federal constitutional provision, is, of course, also inconsistent with appellee's claims, in spite of a labored effort to distinguish the case (Note, page 29). The New York Court of Appeals by Judge CULLEN, said in that case (page 181), as to interstate rendition:

> "It is not governed by international law, but depends solely on the provisions of the Constitution of the United States and the act of Congress made from it."

And again at page 182, in summarizing the holding of this Court, in Lascelles vs. Georgia, 148 U. S., 537:

> "It was there held that interstate rendition did not depend on comity or agreement, but on the provisions of the Constitution of the United States."

In Malcolmson vs. Gibbons, 56 Mich., 459, 466, the Court said:

> "The extradition of criminals who are claimed to be fugitives from other States is governed entirely by the Constitution and Laws of the United States. No State can deal with other States, under the express terms of the constitution without the approval of Congress, and what the State cannot do, its policemen cannot do. An arrest here without compliance with the United States laws cannot be maintained. Michigan cannot treat foreign offenses as domestic, and there is nothing in our statutes which contemplates an arrest without warrant, for purposes of extradition."

In Commw. vs. Tracy, 5 Metcalf, 536, 550, Chief Justice SHAW laid down the principle under which State statutes authorizing purely ancillary State aid are sustainable, saying:

> A statute "authorizing magistrates to issue a warrant and cause such person to be held for examination and imprisoned or bailed for a limited time, is a wise law and one which the legislature are competent to make and enforce, independently of their constitutional obligation to surrender such person to other States, for trial and punishment."

Similarly, in Kurtz vs. State, 22 Florida, 36, 42, the Court said:

> "The demand is evidently the initial point at which the constitution and the law begins to operate, and prior to this neither has any application to the case. While legislation by a State against the constitution and the laws of Congress impairing the full operation of their provisions, would be nugatory, yet it is competent, for a State Legislature to enact laws on the subject at a stage prior to that which the constitution and Federal laws have designated as the time at which they take cognizance of it, provided, that such enactments are not inconsistent with the ends named in the constitution."

In *Ex p.* Ammon, 34 Ohio St., 518, the Court held as to these ancillary statutes, that "State legislation in aid of congressional enactments is not objectionable."

Accordingly, it seems clear on authority that State legislation cannot authorize interstate rendition of fugitives from justice in cases not falling within the Federal statute and constitution, and

that, moreover, the State statute does not attempt to do so, and is subject to the same construction as the Federal enactments, in authorizing rendition only when the cause is before a Trial Court proper, though valid provision has properly been made for arrest and detention and bailing under State law, prior to the making of a requisition, at which point the Federal law begins to operate.

Respectfully submitted,

MAX J. KOHLER,
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Of Counsel.

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FILE COPY

Supreme Court of the United States.

OCTOBER TERM, 1904.

NO. 186.

IN THE MATTER

OF

MORRIS STRAUSS.

BRIEF FOR APPELLEE.

WM. TRAVERS JEROME,
District Attorney
of the County of New York.

HOWARD S. GANS,
Of Counsel.

New York.
Stillman Appellate Printing Co.
1905.

Supreme Court of the United States,

OCTOBER TERM, 1904.

IN THE MATTER

OF

MORRIS STRAUSS.

On a Certificate from the United States Circuit Court of Appeals, for the Second Circuit.

No. 186.

Preliminary Statement.

The appellant, who is the Relator upon whose petition a writ of *habeas corpus* has been sued out, is a fugitive from the justice of the State of Ohio, arrested in the State of New York, under the warrant of the Governor of that State issued pursuant to the demand of the Governor of Ohio.

After his arrest he sued out his writ in the District Court of the United States for the Southern District of New York, alleging that his detention was void and in contravention of the Constitution of the United States, because it did not appear by the papers accompanying the requisition of the Governor of Ohio that he had been "charged" with crime in that State within the meaning of the Constitution.

The defect urged was that the "charge" was founded not upon the indictment of a Grand Jury, but upon affidavits and other papers sworn to before a magistrate having jurisdiction to hold for the action of the Grand Jury.

The point urged is that proceedings for interstate rendition will lie only where an indictment has been found and the requisition is based upon the indictment, unless the demand be made by a State in which a trial may be had on the basis of the complaint before a magistrate without the intervention of a Grand Jury.

The contention, as was perhaps to be expected, has not met with favor in the courts below, but the Circuit Court of Appeals of the Second Circuit, after affirming the order of the District Court which dismissed the writ and remanded the prisoner has, in compliance with the mandatory provisions of the Act of Congress of March 3d, 1891, certified to this Court the constitutional question.

The Questions Certified.

First: Whether the delivery up of an alleged fugitive from justice against whom a complaint for the crime of securing property by false pretenses has been sworn to and is pending before a Justice of the Peace of Ohio having the jurisdiction conferred upon him by the laws of that State, is authorized in view of the provisions of Art. IV., Sec. 2, Subd. 2 of the Constitution.

Second: Is Sec. 5278 of the Revised Statutes in as far as it authorizes the delivery up of an alleged fugitive from justice upon an affi-

davit of complaint pending before a Justice of the Peace in Ohio for the crime of securing property by false pretenses, which said Justice of the Peace has the jurisdiction conferred upon him by the laws of the said State, violative of Art. IV., Sec. 2, Subd. 2 of the Constitution.

The Relator's Contention.

Briefly summarized the Relator's contention appears to be as follows:

(1) Interstate rendition is authorized solely by subd. 2 of Sec. 2 of Art. IV. of the Federal Constitution, which reads as follows:

> "A person charged, in any State, with treason, felony or other crime, who shall flee from "justice and be found in another State, shall, "on demand of the Executive authority of the "State from which he fled, be delivered up, to "be removed to the State having jurisdiction "of the crime."

(2) The Constitution thus requires that the fugitive shall be "charged" with crime in the demanding State.

(3) A person is charged with crime only when a criminal action against him has proceeded to the point of the accusation upon which he is to be tried.

(4) Therefore if he is to be tried upon an indictment, he is not charged with crime until the indictment has been found.

(5) That the provision of Section 5278 of the United States Revised Statutes authorizing the de-

livery up of the fugitive upon a charge contained in an affidavit made before a magistrate is unconstitutional, unless it be confined to those cases of minor crimes in which under the laws of many States the affidavit before the magistrate constitutes the pleading upon which the trial is had.

To us it appears that this contention, though dignified by the learning and ingenuity with which it has been presented, involves such manifest perversion of language and such manifest absurdity of result, as to make it unworthy of serious consideration.

Our answer to it is

First: That it involves results so absurd and so detrimental to the public interest as to make it impossible that it should be adopted even if the language of the Constitution were reasonably susceptible of such interpretation.

Second: That the Constitutional provision, whether interpreted upon the basis of its language alone, or construed in the light of its history and the conditions existing prior to and contemporaneous with its adoption, admits of no such limitation upon the power of the general government.

Third: That even if it be assumed that the contention of the Relator is sound, the limitation is upon the right of the general government to *compel* rendition, and not upon the right of the States *voluntarily to accord it*, and that therefore no Federal question is presented by this certification.

POINT I.

The construction for which the Relator contends, involves results so absurd and so detrimental to the public interest as to make it impossible that it should be adopted even if the words of the constitution were on their face reasonably susceptible of such interpretation.

It is of course unnecessary to multiply authorities to the effect that a reading of a statute or constitution which leads to absurd or noxious results will be rejected unless the plain language of the instrument leaves no room for escape from that construction.

Prigg v. Commonwealth, 16 Pet., 539, 612.
In re Chapman, 166 U. S., 661, 667.
Lau. Ore. Bear. v. U. S., 144 U. S., 47, 59.
Holy Trinity Church v. U. S., 143 U. S., 457, 461.
Jarrolt v. Moberly, 103 U. S., 580, 586.

Since, therefore, the language of the Constitution not only does *not* lead inevitably to the results contended for, but in fact requires the most strained and artificial perversion of plain words in order to arrive at that result, we have undertaken to point out first some of the invidious consequences which flow necessarily from the Relator's contention.

A.

THE LIMITATION SUGGESTED WOULD CREATE A CHAOTIC CONDITION IN THE LAW OF RENDITION, REQUIRING THE RENDITION TO ONE STATE FROM ANOTHER UNDER CONDITIONS IN WHICH THE ASYLUM STATE WOULD HAVE NO RECIPROCAL RIGHTS AS AGAINST THE DEMANDING STATE, AND IT WOULD FAVOR THOSE STATES WHICH AFFORD THE LEAST SAFEGUARDS TO THE ACCUSED AS AGAINST THOSE THAT AFFORD THE GREATER.

It is to be observed that the Relator does not contend that interstate rendition is limited *by the constitution* to the case where the prosecution has been instituted *by indictment*.

He recognizes, of course, that the Constitution imposed no limitation upon the States as to the method in which criminal actions should be commenced or criminal charges should be made. (Hurtado v. California, 110 U. S., 516.)

And he will concede of course that at the time of the adoption of the section here under construction, *i. e.,* prior to the incorporation in the Constitution of the first ten amendments, there was no limitation upon the right of the Federal Government itself to institute criminal proceedings or to provide for the preferment of criminal charges in any form which might seem wise to the Federal legislature.

And he concedes therefore that the provision here under consideration contains no inhibition which would have prevented the Congress from providing for interstate rendition to be based upon the "charge" of crime contained in an information

filed by the prosecuting officer, or in the affidavit of a private citizen, wherever under the laws of the demanding State such an information or affidavit constituted the pleading upon which the defendant was to be tried.

His contention is, therefore, that so far as the Constitution is concerned, the right to secure rendition is dependent solely upon the formalities provided for under the laws of the demanding State, and that the slighter the safeguard to the accused which those laws afford the greater the right of the State to secure the rendition of its fugitives.

Thus, to illustrate, if under the laws of New York a charge of felony could be prosecuted upon the sworn accusation contained in a complainant's affidavit without the intervention of an indictment, and in Pennsylvania such a charge could be prosecuted upon the filing of the unverified information of a prosecuting officer, while in New Jersey it could be prosecuted only by indictment, New York could extradite from New Jersey and Pennyslvania upon the basis of an affidavit; Pennsylvania could extradite from New York and New Jersey upon the basis of an unsworn information filed by a prosecuting officer, while when reciprocal demands came from New Jersey, New York and Pennsylvania would be compelled to refuse to surrender until New Jersey had presented an indictment. And when we remember that in most of the counties of the various States of the Union, Grand Juries meet from two to three times a year, it will be evident that such a situation would constitute a practical guarantee of immunity to the felon who could commit his crime in

New Jersey, if he could get beyond the boundaries of the State without being apprehended.

So much for the confusion which the Constitution itself, as construed by the learned counsel, would render inevitable. An additional element of confusion is injected into the situation by the terms of the statute, for that makes no provision for rendition upon the basis of an information, and, therefore, under the statute as it stands, those jurisdictions which have substituted that method of procedure for the indictment, since they are unable to procure rendition on the basis of the affidavit before a magistrate, are, according to the learned counsel, without *any* means of securing the rendition of their fugitive criminals.

All this would doubtless be a great convenience to the criminal classes and produce a great flow of criminals to the States which continued to prosecute by indictment, and in the end would doubtless compel all the States in self-defense to abandon so cumbersome a safe-guard, but it is somewhat difficult to perceive in what way it would make for that "more perfect union" or for "the establishment of" that "justice," or for the "securing of the blessings of liberty," in the interests of which the Constitution purports to have been adopted.

B.

THE LIMITATIONS SUGGESTED WOULD CREATE AN INVIDIOUS DISCRIMINATION IN FAVOR OF MAJOR CRIMINALS AS AGAINST MINOR ONES TO THE EXTENT OF INSURING TO THE MAJOR CRIMINAL A CHANCE OF ESCAPE WHICH WAS DENIED TO HIS LITTLE BROTHER IN CRIME.

If the Constitution had been framed, as much-harried prosecuting officers are sometimes, in moments of stress, tempted to suspect, for the protection of the criminal and the promotion of crime, the construction contended for by the learned counsel for the Relator would have at least this to commend it, namely, that it would then be consistent with the primary purpose of the instrument. For if such had been the object of the Constitution then it might well be argued, "the greater the criminal, the greater his rights," and that a construction of that instrument which conferred to the greater criminal marked advantages over the lesser was quite consistent with its general purposes.

That such would be the effect of the construction contended for is, of course, quite obvious. Even in the rare jurisdictions, where Grand Juries are continuously in session, the time required to procure an indictment is usually sufficient to give an escaped criminal a long start, while an affidavit setting forth the crime and containing in itself complete evidence of its commission can ordinarily be laid before a magistrate on the instant.

In by far the greater number of jurisdictions the minor crimes (misdemeanors), are prosecuted upon the basis of the complainant's affidavit, while the graver crimes are prosecuted only after and on the basis of the indictment.

It follows, therefore, upon the logic of the learned counsel, that the greater criminal is always to be given a longer handicap in the race between himself and justice than is to be accorded to the lesser lights in the criminal profession.

Of course it is no answer to this suggestion to suggest that the criminal may be apprehended at once and held to await the indictment, to be surrendered for rendition if it shall be forthcoming, and to be set free if it shall not be found, for the preliminary detention is merely an incident of the rendition and it is impossible to contend logically that there can be any right to hold preliminarily except upon a representation that there have been taken in the demanding State the judicial proceedings which warrant a demand for the rendition.

Were it otherwise a citizen of any State might be held in custody for months until the Grand Jury of some remote county of a demanding State had been convened and had taken action. And even if it could be held that such a course were permissible it is submitted that a construction which compels its adoption is not one that can consistently be urged in the interest of the liberty of the individual, nor is it such as will naturally commend itself on any other basis.

C.

THE LIMITATION SUGGESTED WOULD RENDER THE RENDITION OF A FUGITIVE FROM A SISTER STATE MORE DIFFICULT THAN AN EXTRADITION FROM A FOREIGN POWER.

Another of the interesting results which would flow if the contention of the learned counsel for the

Relator were to prevail is, that a constitution adopted in the interests of a more perfect union of the people and the States, will have resulted in making the several States, in one aspect, more completely foreign than are independent nations.

For, while fugitives from justice will be delivered up by and to foreign powers to and by the several States (through the intervention of the Federal Government), upon the basis of the proof of crime contained in affidavits taken before a magistrate, it will be impossible to secure their rendition from a sister State without producing evidence of the action of a Grand Jury; so that the State of Texas, for instance, will be in the anomalous position of being able to reclaim with ease those of its fugitives who escape to the Republic of Mexico, and of being compelled to sit idly by while those violators of the law who have taken refuge in Louisiana contrive to disappear and cover up their trails beyond the hope of successful pursuit.

D.

THE CONSTRUCTION CONTENDED FOR WOULD NOT SERVE AS A SAFEGUARD TO THE ACCUSED OR PREVENT UNWARRANTED EXTRADITIONS.

A somewhat elaborate argument *ab inconvenienti* is framed by the learned counsel for the Relator to establish that rendition between the States, if permitted on the basis of affidavits, may involve a form of oppression which will be obviated if the Constitution and statutes be so construed as to limit it to the instances where an indictment has been found. His suggestion is that after a rendition upon the basis of such papers the Grand

Jury *may* conclude not to indict, and the fugitive will thus have had his trip beyond the borders of his own State for nothing.

One answer to this is that even where the rendition is based on an indictment the prosecuting and the defendant's journey in that case will be equally barren.

A second answer is that we are content to send our citizens beyond the seas to take a like risk, and it would seem strange therefore that that consideration should operate against delivering him up within the Union.

A third answer is that, while in theory of law an indictment is doubtless a more solemn form of accusation and carries with it a greater sanction of the charge contained in it than flows from a magistrate's finding based upon the affidavits or depositions taken by him, yet as a matter of common knowledge and experience the magistrate's papers really furnish to the person demanded a greater safeguard than does an indictment. For the indictment found by a body of laymen on what to them seems probative, may be, and often is, founded upon that which falls absurdly short of legal proof, and yet upon its face it is subject to neither criticism nor attack, provided at least that it alleges properly the conclusions of fact to which the Grand Jury have arrived. While the papers taken before a magistrate must set forth the evidentiary facts in form sufficient to stand the test of legal analysis in the asylum State (People *ex rel.* Lawrence v. Brady, 56 N. Y., 182; State v. Swayse, 72 Mo., 399).

Furthermore, where there has been a rendition

on the basis of an indictment, the person surrendered ordinarily has no redress, even though the Grand Jury acted upon evidence ridiculously insufficient, while the institution of a wrongful proceeding before a magistrate for the purpose of procuring the arrest of the defendant in another jurisdiction and of haling him within the demanding State would, if it failed to result in an indictment and trial, ordinarily furnish him ample redress by means of an action of false imprisonment or malicious prosecution.

And it is doubtless the realization that, for the purposes of rendering up a criminal, the proceeding by affidavit furnishes the greater safeguard, that has led to the adoption of that form of procedure as the exclusive basis of international extradition.

And it is probably also the universal recognition that it is easier to challenge the sufficiency of proof by affidavit than to find any defect in an indictment, that has led to the common use of indictments by prosecuting officers as the final basis of interstate rendition, even in cases where the fugitive has first been held upon the basis of magistrate's papers, though, of course, renditions upon the basis of affidavits have not been uncommon.

In re Clark, 9 Wend. (N. Y.), 212.
Kingsbury's Case, 106 Mass., 223.
In re Burke, Fed. Cas. No. 2158.
Kurtz v. State, 22 Fla., 36.
In re Manchester, 5 Cal., 237.
In re White, 55 Fed. Rep., 54.
In re Keller, 36 Fed. Rep., 681.
State v. Richardson, 34 Minn., 115.
In re Hooper, 52 Wis., 699.

And the utter immateriality of the indictment or affidavit considered *as a pleading*, from the point of view of rendition proceedings, and their importance solely as *evidence of the existence of a basis for prosecution* is made conclusively clear by the fact that, once the rendition has been accomplished, it is not incumbent upon the demanding State to prosecute upon the basis of the charge as set forth in the indictment or affidavit upon which the rendition has been procured, and it *is* completely at liberty to indict anew for the same offense, or even to prosecute for an entirely new and different offense. (Lascelles v. Georgia, 148 U. S., 537.)

This consideration, we conceive, goes to the very foundation of the argument of the learned counsel and deprives it of all logical basis.

To sum up, therefore, it appears that to restrict the rendition to cases in which there is presented to the executive of the asylum State the pleading upon which the prisoner is to be tried leads to manifest absurdity in the law and tends to the promotion of crime, without furnishing to the person apprehended any safeguard against oppression which is not available to him where an affidavit is the basis of the demand.

POINT II.

There is no basis in the language of the Constitution for restricting the right of rendition to the cases in which the demand is accompanied by the criminal pleading upon which the defendant is to be tried and such restriction is at variance both with the contemporaneous construction and the history and origin of the provision.

The section of the Constitution (Art. IV., Section 2) is as follows:

> "A person *charged* in any State with treason, felony or other crime who shall flee from justice and be found in another State shall, on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime."

It is to be observed that the Constitution does not limit the obligation of the States to the cases of persons "indicted" or "informed against" or to persons "against whom charges have been laid in criminal *pleadings*." Nor does it in any other way undertake to prescribe the form in which the "charge" is to be made, or the evidence which shall be required before the demand shall be complied with.

That duty of definition and limitation was thus left to the Congress (Prigg v. Commonwealth, 16 Pet., 620; Kentucky v. Dennison, 24 How., at p. 104), which enacted in 1793 the act which in all

substantial particulars has been re-enacted as 5278 of the Revised Statutes, whereby it was provided:

> "Sect. 5278. Whenever the executive authority of any State or Territory demands any person as a fugitive from justice of the executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the Governor or chief magistrate of the State or Territory from whence the person so charged has fled, it shall be the duty of the executive authority of the State or Territory to which such person has fled to cause him to be arrested and secured * * *."

The constitutionality of this act in all its parts has never been seriously doubted, and has many times been clearly affirmed by this Court.

> Prigg v. Commonwealth, 16 Pet., 539, 622.
> *Ex Parte* Reggel, 114 U. S., 642.
> Roberts v. Reilly, 116 U. S., 80, 95.

And while there are no decisions flat-footed upon the question here sought to be raised, this arises, we submit, because no one has heretofore conceived such a construction possible rather than because there is any room for doubt upon the question.

Certainly the word "charged," in its ordinary acceptation, while doubtless sufficiently technical to exclude the idle gossip of the neighborhood or any informal accusation, is also sufficiently inclusive to embrace any formal accusation made before a judicial officer in the regular course of a criminal proceeding. And so this Court has said.

> Kentucky v. Dennison, 24 How. at p. 104.

Manifestly, it was thus that the Congress construed it in 1793, when Washington, the President of the Constitutional Convention, was President of the United States, and when many of the delegates to that Convention were members of the Congress that enacted the law; and concededly this construction is entitled to, and will be accorded the greatest weight.

> Prigg v. Commonwealth, 16 Peters, p. 621.
> Kentucky v. Dennison, 24 How., p. 104.

And this construction has been followed and sanctioned in practice from the early years to the present time without question as to its validity (see Moore on Extradition, Vol. II., §546, p. 871; Spear on Extradition, p. 266).

And manifestly this is the sense in which the word "charged" is commonly used in the law. To charge is "to accuse" (Bouvier's Law Dictionary). BLACKSTONE speaks of the person arrested in preliminary proceedings as being "charged" with crime; and describes how and when the person so "charged" is to be bound over by the committing magistrate to answer the "charge" prior to the filing of an indictment or information.

> "First, then, of an arrest; which is the apprehending of one's person, in order to be forthcoming to answer an alleged or suspected *crime*. To this arrest all persons whatsoever are equally liable in all criminal cases, but no man is to be arrested, unless *charged* with such a crime as will at least justify holding him to bail when taken" (Blackstone's Commentaries, Book IV., Chap. XXI). * * *
>
> "Sir Edward Coke, indeed, hath laid it down that a justice of the peace cannot issue a warrant to apprehend a felon upon bare suspicion; no, not even till an indictment be actually found; and the contrary practice is by others

> held to be grounded rather upon connivance than the express rule of law; though now by long custom established. A doctrine which would, in most cases, give a loose to felons to escape without punishment; and therefore Sir Matthew Hale hath combated it with invincible authority and strength of reason; maintaining, 1: That a justice of the peace hath power to issue a warrant to apprehend a person *accused* of felony, though not yet *indicted*" (p. 997).

And again, speaking of the preliminary hearing and its results, he says:

> "If upon this inquiry it manifestly appears that either no such crime was committed, or that the suspicion entertained of the prisoner was wholly groundless, in such cases only it is lawful totally to discharge him. Otherwise he must either be committed to prison, or give bail; that is, put in securities for his appearance, to answer the *charge* against him" (p. 1001).

Speaking of the powers of a justice of the peace to issue a warrant, SIR MATTHEW HALE says:

> "And therein I say as followeth:
>
> 1. That a justice of the peace hath power to issue a warrant to apprehend a person *accused* of felony, *tho not yet indicted*."

(Italics ours throughout.)

Hale's Pleas of the Crown, 1st Am. Ed., Book 2, Chap. 12, p. 108.

Also it is observed that the constitutional provision has never heretofore been construed in any such spirit of narrowness or technicality as is involved in the contentions of the relator, for otherwise it could never have been held that a person became a "fugitive" merely by departing from a State in which he had committed a crime, though

his departure were unaccompanied by evidences of haste or evasion (*Ex parte Reggel*, 114 U. S., 642), or that the delivery up to the State "having jurisdiction of *the* crime," warranted a delivery up to that State for prosecution for any other crime, without even an attempt to prosecute for *the* crime upon which the extradition proceeding was founded (Lascelles v. Georgia, 148 U. S., 537).

Moreover, any construction other than that thus given by the statute would be manifestly at variance with the whole purpose and spirit of the Constitution, namely, to create a more perfect union, and to weld into a nation what had been theretofore a more or less loosely-bound confederation of independent States. Manifestly, so far as the enforcement of the criminal laws was concerned, there could be no real nationality, if any right of asylum in the various States could be accorded to the criminals of other States, and unless provision were made for the *immediate* apprehension anywhere within the Union of those criminals who had fled beyond the borders of the jurisdiction where their crime had been committed.

To quote from Kentucky v. Dennison (*supra*):

> "For this was not a compact of peace and comity between separate nations who had no claim on each other for mutual support, but a compact binding them to give aid and assistance to each other in executing their laws, and to support each other in preserving order and law within its confines, whenever such aid was needed and required; for it is manifest that the statesmen who framed the Constitution were fully sensible, that from the complex character of the Government, it must fail unless the States mutually supported each other and the General Government; and that nothing would be more likely to disturb its peace, and end in discord, than permitting an offender against

> the laws of a State, by passing over a mathematical line which divides it from another, to defy its process, and stand ready, under the protection of the State, to repeat the offense as soon as another opportunity offered" (p. 100).

Moreover, as is also pointed out by the same authority, interstate rendition was no new thing. There had been inter-colonial rendition by treaty between the New England Colonies as early as 1643. Whereby, "upon the escape of any prisoner or *fugitive for any criminal cause*, whether by breaking prison or getting away from the officer, *or otherwise escaping*," the fugitive should be rendered to the jurisdiction from which he had fled and whereby the basis of the rendition was "the certificates of two magistrates of the jurisdiction out of which the escape was made that he was a prisoner *as such offender* at the time of the escape."

And a similar practice obtained among the other colonies, even in the absence of express provision of law, the basis of the rendition being the certificate of a judicial officer.

> Kentucky v. Dennison, 24 How., pp. 100, 101.
>
> XIII. Am. Law Rev., at p. 188 *et seq.*
>
> Moore on Extradition, Vol. II., Sec. 518.

The practice was continued under the "Articles of Confederation which limited the *obligation* to surrender to cases of treason, felony and *high misdemeanors*," and required the demand of the executive of the pursuing State (Art. 4, subd. 2), and concurrently with the rendition under that provision it was not unusual to surrender fugitives under the old methods without requiring the intervention of the executive.

Moore on Extradition, Vol. II., Sec. 519.
XIII. Am. Law Rev., at pp. 189 and 190.

To assert, therefore, that by the Constitution it was provided that these old customs should be abolished and that fugitives should no longer be surrendered upon the evidence of a preliminary proceeding and until there had been given to the asylum State that assurance of good faith involved in the formulation of the pleading upon which the accused is to be put to his trial, is to give the lie to the solemn announcement of the preamble that the Constitution was adopted "to form a more perfect union."

To sum up under this head, therefore, it is submitted,

First: That the language of the Constitution does not require and, indeed, does not permit the construction for which the Relator contends.

Second: That such a construction is inconsistent with its general purposes.

Third: That such a construction is at variance with a contemporaneous construction ever since adhered to, and

Fourth: That it is at variance with the history, origin and evolution of the provision.

POINT III.

Even if the Relator's contention were sound it would establish merely a limitation upon the right of the Federal Government to compel rendition. There is no such limitation upon the right of the State voluntarily to accord it, and the detention of the Relator under State process does not involve the invasion of any right protected by the Federal constitution.

Finally, we submit, even if the learned counsel for the Relator were right, in his interpretation of the constitution and the statute, he would have no standing in this court.

His complaint is not that any right under the constitution or the laws of the United States has been denied him; not that the State of New York has refused to perform the obligations imposed upon it by the fundamental law of the land, but that it is performing *more than its obligations* and causing his surrender when neither the constitution nor the statutes of the United States *require it* to do so.

This, we maintain, the State of New York has a perfect right to do.

That the several States had, at the inception of the government, and except in so far as they may be held to have surrendered it to the general government, still have the right to deliver up fugitives from justice, at will, is clear upon principle, and settled both by practice and authority. For neither the Federal Constitution nor the Federal statutes

provide any means for the detention of fugitives pending the completion of the rendition proceedings, and such preliminary detention must be, and universally has been, founded upon the sovereign power of the State to deliver up foreign criminals that may come within its jurisdiction—a power based both upon the *quasi* international relations between the States, and upon the right of each sovereignty to protect itself against the dangers incident to harboring criminals.

As was said in *Commonwealth v. Wilson*, 1 Phila., 80:

> "We do not agree to the position assumed that the oath must be made under the Act of Congress. When so made and properly certified, or when an indictment is found in another State and properly authenticated, we consider it conclusive, and we have no right to inquire behind it. But where fugitives are pursued, * * *.
>
> "It is not so much a matter of comity as a police regulation of our own to get rid of dangerous delinquents. We do not sustain the proceedings for the benefit of the State whose laws he violated alone, but for our own safety. We are well aware that the legislation of Congress is exclusive in many cases and if the rights of Virginia alone were concerned she could not urge us to do more than carry into effect the Congressional provision. But every State has a right to protect its own citizens from the felons of other States. And if we chose to permit our magistrates to exercise such jurisdiction on an oath made under our own laws the fugitive charged with felony cannot lawfully complain."

That this power still resides in the States with respect to interstate surrender* seems equally clear.

*Of course as to *international* extradition, the general theory of our Government, which reposes all power of dealing with independent sovereignties in the Federal Government, would imply a surrender of the right of the State.

The provision of the Constitution neither by express language nor by necessary or fair implication vests the power of delivering up criminals from one State to another *exclusively* in the Federal Government.

Undoubtedly so far as the Congress has legislated upon the subject, its enactment is the supreme law of the land, and no State laws which *conflict* with that enactment can have any validity.

But the national legislation has not, and does not purport to have covered the entire field. State legislation in aid thereof, has been adopted in almost all, if not in all of the States of the Union, and the validity of such legislation has never been questioned.

And the right of a State to enact legislation upon a subject as to which the jurisdiction is concurrent where such legislation is consistent with that of the Federal Government and merely relates to matter not completely embraced in the Federal enactment, is settled upon general principles.

Reid v. Colorado, 187 U. S., at p. 147.

Indeed, were it not for State action there could be no effective interstate rendition, since the Federal statutes make no provision for preliminary detention and since the constitutional provision requiring the surrender is not self-operative, and the Federal legislation in furtherance thereof imposes only a moral obligation unenforceable either by the Federal or State Governments.

Kentucky v. Dennison, 24 How., pp. 109, 110.

That this power to surrender fugitives from one State to another has been reserved by the States seems, therefore, clear upon principle. And it has

in its support the opinions of judges of high authority.

State v. Anderson, 1 Hill Law R. (South Carolina), 348, 349.
Matter of Fetter, 23 N. J. Law, 315, 316.
Com. v. Wilson, 1 Phila., 80.
State v. Hall, 115 N. C., at p. 818, 824.

In *State v. Anderson*, decided by the Supreme Court of South Carolina in 1833, 1 Hill Law, 348, Judge JOHNSON, writing for the Court, said:

> "I have thus shown that it is not only lawful, but the duty of one sovereign, independent State, to arrest and deliver up the fugitives from justice from another, * * *
>
> "A question has been raised whether the Constitution of the United States and the Act of Congress of 1793 have not, as between the co-States, superceded and abrogated the laws of nations; and whether a fugitive from justice from one State can be lawfully arrested in another without demand having been first made by the executive of the State in which he has fled, upon the executive of the State in which he is found. * * *
>
> "In the consideration of this question, it is not my purpose to enter into the exciting and much contested political question, as to the nature, objects, and extent of the relative obligations, which the Constitution imposes on the several States, composing the Union. For the purpose of this case it is wholly immaterial whether they are regarded as entirely sovereign and independent, or consolidated into one government, or as occupying any point between these extremes; provided the obligations which their bond of union imposes, do not enjoin upon them to do each other all the evil they can. If they stand in the relation of sovereign and independent States, then the laws of nations apply and justify the arrest,

and must prevail, unless controlled by the provisions of the Constitution.

"Whether we regard the causes which gave rise to the Federal Constitution, its general tenor and import, its particular provisions, it is obvious, that whatever may have been the relation existing between the States before, it never was intended to separate them more widely than they would have been, as independent States. On the contrary, its whole history shows that its object was, in the language of the preamble, 'to form a more perfect union, establish justice, &c.'

"Between independent nations war, the *ultima ratio*, is the usual means of enforcing the obligations of the laws of nations; and we have before seen, that harboring fugitives from justice is just cause of complaint by one nation or government against another. It was necessary to guard against this evil, and in this spirit the provision of the Constitution before referred to, and the Act of Congress of 1793, were doubtless framed—not with the intention of abrogating the laws of nations, but in this respect, and to this extent, to make them imperative on the States, and to supercede the necessity of resorting to the sword.

"In most cases the States are separated from each other by an imaginary line, and if passing one of these the traitor or felon should find a sanctuary where no hand dare touch him which was not armed with executive authority, an age spent in pursuit can scarcely be regarded as a time, within which it could reasonably be expected an offender could be brought to justice. There is certainly no express provision in the Constitution, which renders this formula imperative; nor could it ever have been intended by the framers of that instrument, to confer such an immunity on offenders against public justice."

In discussing the same question it was said by

the highest court of New Jersey, in Matter of Fetter (23 N. J. L., 315, 316):

> "In considering this question it is material to observe that this clause of the Constitution does not contain a grant of power. It confers no right. It is the regulation of a previously existing right. It makes *obligatory* upon every member of the confederacy the performance of an act which previously was of doubtful obligation. All writers upon the law of nations agree that it is the right of every sovereign State to expel from its territory or to surrender to another nation in amity with it, an offender against the laws of such foreign nation. No State is bound to harbor criminals within its bosom, but may, at its option, surrender them to the government against whose laws they have offended. * * *
>
> "But whatever difference of opinion may exist in regard to the obligation resting upon one nation to surrender a fugitive from justice upon the demand of another nation in amity with it, there is no denial and no question of the right of every sovereign nation to surrender fugitives within its territory. The whole effect of the Constitution was to confer upon each member of the confederacy the *right to demand* from every other member of the confederacy, a fugitive and to make *obligatory* the surrender which was before discretionary."
>
> Matter of Wm. Fetter, 23 N. J. L., 315, 316.

And recently, and even more emphatically the highest Court of North Carolina has enunciated the same doctrine:

> "*In the exercise of its reserved sovereign powers* the State may, as an act of comity to a sister State, provide for the surrender upon requisition of a person, who like the prisoners, are indictable for murder in another State, *though they have never fled from justice.*"
> (Italics ours.)

State v. Hall, 115 N. C., 818, and see same doctrine in dissenting opinion, at p. 824.

Moreover, there is high authority for the statement that this theory of the power of interstate rendition in excess of the Federal requirement, prevailed and was generally honored in the observance during the first fifty years of our natianal life. Mr. Justice CATRON in the opinion filed by him in Holmes v. Jennison, says:

> "The Constitution equally cuts off the power of the States to agree with each other, as with a foreign power, yet, it is notoriously true, that for the fifty years of our existence under the Constitution, the States have, in virtue of their own statutes, apprehended fugitives from justice from other States, and delivered them to the officers of the State where the offense was committed; and this, independently of the Fourth Article and Second Section of the Constitution, and the Act of Congress of 1793, Ch. 51, which provides for a surrender on the demand of the executive of one State upon that of another. The uniform opinion heretofore has been, that the States on the formation of the Constitution, had the power of arrest and surrender in such cases; and that so far from taking it away, the Constitution had provided for its exercise, contrary to the will of a State, in case of an unjust refusal; thereby settling, as amongst the States, the contested question, whether on a demand, the obligation to surrender was perfect and imperative, or whether it rested on comity, and was discretionary."
>
> 14 Pet., 597.

It seems clear, therefore, that the States have complete power over the subject of interstate rendition, so long as they pass no law and authorize no act restrictive of the rights conferred, and duties imposed, by the Federal Constitution.

So that if the State of New York were to enact a law whereby it was provided that a peace officer of another State armed with a warrant issuing out of the Courts of that other State, might execute his warrant within the State of New York and transport his prisoner to the State in which the crime was charged, there would be no conflict between that legislation and the Federal Constitution.

We are aware that there are expressions in various of the decisions which would seem at first blush to be at variance with these conclusions, but an examination of the authorities will show that in every case that which was under consideration was the *obligation* of the State under the Federal Statute;* and that the opinions proceeded on the theory that there was in each case no State law applicable to the subject; and it will appear further that the right of the State is to legislate upon the subject is one upon which opinion has been expressly reserved by this Court (see Lascelles v. Georgia, 148 U. S., at p. 545).

If this be recognized as sound there can be only two grounds of Federal jurisdiction over the legality of an arrest in extradition

First: If the arrest is made and the warrant is

*Such, for instance, was the recent case of Hyatt vs. Corkran, 188 U. S., 691, where this Court reviewed the action of the State Courts in releasing a prisoner held by virtue of an extradition warrant issued by the Governor of New York. Of course the Governor, in issuing the warrant, was entitled to fall back upon the authority derived from the Federal statute; in so far as he was authorized by the Federal statute to issue it he was entitled to the protection of the Federal Government, and the action of the State Court which nullified his acts obviously called in question a power derived from and exercised under the Constitution and statutes of the United States, and was thus subject to review. If the determination of the State Courts had been the reverse, and they had held that, under the State laws, the warrant was properly issued, we conceive that there would have been no ground of review.

issued *solely* upon the authority of the Federal legislation; *Second:* If the arrest constitutes an invasion by the State or its officers of the privileges and immunities of the Federal citizenship, a failure to accord to a citizen of another State the rights and privileges of the citizen of the State, or an invasion of liberty without due process of law.

But clearly neither of these grounds of jurisdiction exists where the arrest is made for the purposes of an orderly criminal proceeding, no matter where within the Union such proceeding is to be had, and is made pursuant to a law of the State, and is not the mere arbitrary act of the executive authorities.

For where there is a law of the State conferring upon the Governor the authority and imposing upon him the duty to cause to be arrested and delivered, a fugitive from another State, he must clearly be held to be acting under that law which creates and imposes a perfect obligation, rather than under the Federal statutes, which are merely declarative of a moral obligation of the State, the performance of which is imposed upon no individual.

It follows, therefore, that where there is such State legislation, since the detention is in pursuance thereof, there can be no ground of Federal jurisdiction upon the theory that the construction of the statutes or Constitution of the United States is involved.

It follows also that where there is such State legislation the other possible grounds of Federal jurisdiction are also eliminated.

It is not one of the privileges or immunities of a citizen of the United States to be arrested in any particular manner or by any particular officer, or to be exempt from arrest at any particular place.

Mahon v. Justice, 127 U. S., 700.
Lascelles v. Georgia, 148 U. S., 537, 543, 544.

There can be no denial to the citizens of a sister State of the privileges of citizenship in the State by a system of laws which applies to each and all alike.

Paul vs. Virginia, 75 U. S. (8 Wall), 168, 180.
Slaughter House Cases, 83 U.S.(16 Wall), 36, 37.
Cole v. Cunningham, 133 U. S., 107, 113, 114.
Blake vs. McClung, 172 U. S., 239, 252.

And there is no denial of due process of law where the arrest is made in pursuance of an orderly system of statutory regulations for the purpose of subjecting the individual to an orderly trial under any of the forms known to and sanctioned by the common law, or under any other form of procedure which does not involve a denial of fundamental rights.

Hurtado v. California, 110 U. S., 516, 537.
Maxwell v. Dow, 176 U. S., 581.
Brown v. New Jersey, 175 U. S., 172, 174.
Reetz v. Michigan, 188 U. S., 505.
West v. Louisiana, 194 U. S., 258, 261.

Indeed, it may well be doubted whether any form of arrest or detention concededly preliminary to and in furtherance of a legal inquiry will constitute a denial of due process of law, or at all events, a denial such as will call for the intervention of the Federal Courts in the first instance.

Cook v. Hart, 146 U. S., 189, p. 194.
Lascelles v. Georgia, 148 U. S., 537.

Mahon v. Justice, 127 U. S., 700.
Ker v. Illinois, 119 U. S., 436.

It remains, therefore, only to consider whether there is authority in the New York statutes for the arrest and delivery of the defendant.

Such authority is to be found in Section 827 of the Code of Criminal Procedure, which provides a complete machinery for rendition, and which has been held of itself to impose a duty upon the Governor (Matter of Scrafford, 59 Hun, (N. Y.), at p. 327).

That section reads as follows:

> Sec. 827. To be delivered up by the Governor, on demand, *et cetera.*
>
> *It shall be the duty of the Governor*, in all cases where by virtue of a requisition made upon him by the Governor of another State or Territory, any citizen, inhabitant or temporary resident of this State is to be arrested, as a fugitive from justice, provided that said requisition be accompanied by a duly certified copy of the indictment or information* from the authorities of such other State or Territory, charging such person with treason, felony or crime in such State or Territory, to issue and transmit a warrant for such purpose to the sheriff of the proper county or his undersheriff, or in the cities of this State (except in the City and County of New York, where such warrant shall only be issued to the superintendent or any inspector of police), to the chiefs, inspectors or superintendents of police, and only such officers as are above mentioned, and such assistants as they may designate to act under their direction, shall be competent

*The sense in which "information" is used, *i. e.*, as equivalent to preliminary accusing affidavit before a magistrate, will be seen by a comparison with Section 145 of the same Code, which reads as follows: "The information is the allegation "made to a magistrate that a person has been guilty of some "designated crime."

to make service of or execute the same. The Governor may direct that any such fugitive be brought before him, and may for cause, by him deemed proper, revoke any warrant issued by him, as herein provided. The officer to whom is directed and intrusted the execution of the Governor's warrant must, within thirty days from its date, unless sooner requested, return the same and make return to the Governor of all his proceedings had thereunder, and of all facts and circumstances relating thereto. Any officer of this State, or of any city, county, town or village thereof, must, upon request of the Governor, furnish him with such information as he may desire in regard to any person or matter mentioned in this chapter.

2. Before any officer to whom such warrant shall be directed or intrusted shall deliver the person arrested into the custody of the agent or agents named in the warrant of the Governor of this State, such officer must, unless the same be waived, as hereinafter stated, take the prisoner or prisoners before a judge of the Supreme Court, or a county judge, who shall, in open court, if in session, otherwise at chambers, inform the prisoner or prisoners of the cause of his or their arrest, the nature of the process, and instruct him or them that if he or they claim not to be the particular person or persons mentioned in said requisition, indictment, affidavit or warrant annexed thereto, or in the warrant issued by the Governor thereon, he or they may have a writ of *habeas corpus* upon filing an affidavit to that effect. Said person or persons so arrested may, in writing, consent to waive the right to be taken before said Court or a judge thereof at chambers. Such consent or waiver shall be witnessed by the officer intrusted with the execution of the warrant of the Governor, and one of the judges aforesaid, or a counselor-at-law of this State, and such waiver shall be immediately for-

warded to the Governor by the officer who executed said warrant. If, after a summary hearing as speedily as may be consistent with justice, the prisoner or prisoners shall be found to be the person or persons indicted or informed against and mentioned in the requisition, the accompanying papers and the warrant issued by the Governor thereon, then the Court or Judge shall order and direct the officer intrusted with the execution of said warrant of the Governor, to deliver the prisoner or prisoners into the custody of the agent or agents designated in the requisition and the warrant issued thereon, as the agent or agents upon the part of such State to receive him or them; otherwise to be discharged from custody by the Court or Judge.

If upon such hearing the warrant of the Governor shall appear to be defective or improperly executed, it shall be by the Court or Judge returned to the Governor, together with a statement of the defect or defects, for the purpose of being corrected and returned to the Court or Judge, and such hearing shall be adjourned a sufficient time for the purpose, and in such interval the prisoner or prisoners shall be held in custody until such hearing be finally disposed of.

3. It shall not be lawful for any person, agent or officer to take any person or persons out of this State, upon the claim, ground or pretext that the prisoner or prisoners consent to go, or by reason of his or their willingness to waive the proceedings aforedescribed, and any officer, agent, person or persons who shall procure, incite or aid in the arrest of any citizen, inhabitant or temporary resident of this State, for the purpose of taking him or sending him to another State, without a requisition first duly had and obtained, and without a warrant duly issued by the Governor of this State, served by some officer as in this section provided, and

without, except in case of waiver in writing as aforesaid, taking him before a Court or Judge as aforesaid, unless in pursuance to the provisions of the following sections of this chapter, and any officer, agent, person or persons who shall, by threats or undue influence, persuade any citizen, inhabitant or temporary resident of this State to sign the waiver of his right to go before a Court or Judge as hereinbefore provided, or who shall do any of the acts declared by this chapter to be unlawful, shall be guilty of a felony, and upon conviction, be sentenced to imprisonment in a State prison or penitentiary for the term of one year. Any willful violation of this Act by any of the above-named officers shall be deemed a misdemeanor in office."

Now, the Courts of New York have uniformly recognized the practice of rendition upon the basis of affidavits, and since this is true, it follows, if we are sound in our previous contention, that this Court will accede to the propriety of that construction, even though it would construe differently a Federal statute in identical terms.

In re Kemmler, 136 U. S., 436, 449.
McNulty v. California, 149 U. S., at p. 647.
West v. Louisiana, 194 U. S., 258, 261.

It follows, therefore, that the case does not present a question of Federal cognizance, and that the appeal should be dismissed.

To sum up under this head, therefore, our argument is as follows:

1. The States have as an attribute of sovereignty the right to surrender fugitive criminals under such conditions as to each State may seem best.

2. By the Constitution they have limited the right to *refuse* rendition, but have imposed no limitation on the right to *grant* it.

3. Where a State official has no warrant in State law for the issuance of a rendition warrant he may, perhaps, be presumed to be acting under the authority of the Federal statute and of that statute alone, and under such circumstances his power to act may, perhaps, be limited by the terms of the Federal statute, and an attempt to act in excess of such authority may be subject to restraint by the Federal Courts.

4. But where a State official derives authority from the laws of his State to issue an extradition warrant, the legality of his action in issuing the warrant is dependent solely upon its conformity with such laws; the question is to be determined solely by the State courts, and affords no ground of Federal jurisdiction.

IN CONCLUSION.

It is respectfully submitted, therefore, that the first question certified should be answered in the affirmative, and the second in the negative, and that the case should be remitted to the court below with instructions to dismiss the writ for lack of jurisdiction and to remand the prisoner to the detention from which he was taken.

WM. TRAVERS JEROME,
District Attorney of the County of New York.

HOWARD S. GANS,
Of Counsel.

Supreme Court of the United States.

No. 186.—October Term, 1904.

In the Matter of Morris Strauss. } On a certificate from the United States Circuit Court of Appeals for the Second Circuit.

[April 3, 1905.]

The petitioner was charged by affidavit before a justice of the peace of Youngstown Township, Ohio, with the crime of obtaining four hundred dollars' worth of jewelry at Youngstown, Ohio, by false pretences, contrary to the law of that State. He was arrested as a fugitive from justice and brought before a magistrate of the city of New York, August 11, 1902. The governor of New York, after a hearing, at which the accused was represented by counsel, issued his warrant, dated August 22, 1902, directed to the police commissioner of New York city, directing him to arrest the accused and deliver him to the duly accredited agent of Ohio, to be taken to that State.

The warrant recites that it has been represented by the governor of Ohio that the accused stands charged in that State of the crime of securing property by false pretences, which is a crime under its law, and that he has fled from that State. It also recites that the requisition was accompanied by affidavits and other papers, duly certified by the governor of Ohio to be authentic, charging the accused with having committed the said crime and with having fled from Ohio and taken refuge in the State of New York.

On the 29th of August, after the arrest of the petitioner, a writ of *habeas corpus* was allowed by the District Court. The police commissioner made return that he held the accused by virtue of the governor's warrant. On September 16, 1902, the District Court discharged the writ and remanded the accused to the custody of the police commissioner. This order was taken on appeal to the Circuit Court of Appeals of the Second Circuit, which certified the following questions:

"First. Whether the delivery up of an alleged fugitive from justice against whom a complaint for the crime of securing property by false pretences has been sworn to and is pending before a justice of the peace of Ohio having the jurisdiction conferred upon him by the laws of that State is authorized in view of the provisions of Article IV, section 2, subdivision 2, of the Constitution?

"Second. Is section 5278 of the Revised Statutes, in as far as it authorizes the delivery up of an alleged fugitive from justice upon an affidavit of complaint pending before a justice of the peace in Ohio for the crime of

securing property by false pretences, which said justice of the peace has the jurisdiction conferred upon him by the laws of the said State, violative of Article IV, section 2, subdivision 2, of the Constitution?"

Article IV, section 2, subd. 2, of the Constitution reads:

"A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime."

Revised Statutes, sec. 5278, so far as is material, is:

"Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, it shall be the duty of the executive authority of the State or Territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear."

Mr. Justice BREWER delivered the opinion of the Court.

The Constitution provides for the surrender of a person charged with treason, felony or other crime. The statute prescribes the evidence of the charge to be produced, to wit: "A copy of an indictment found or an affidavit made before a magistrate . . . charging . . . treason, felony, or other crime." The offence for which extradition was sought is under the Ohio statute a felony, (Bates' Annotated Ohio Stat. 4th edition, sec. 7076,) and subject to trial only upon an indictment, (Art. 1, sec. 10, Bill of Rights, Ohio Constitution,) the proceedings in such a case before a justice of the peace being only preliminary and for the purpose of securing arrest and detention. It is contended that the constitutional provision for the extradition of persons "charged with treason, felony or other crime" requires that the charge must be pending in a court that can try the defendant, and does not include one before a committing magistrate, who can only discharge or hold for trial before another tribunal.

But why should the word "charged" be given a restricted interpretation? It is found in the Constitution, and ordinarily words in such an instrument do not receive a narrow, contracted meaning, but are presumed to have been used in a broad sense, with a view of covering all contingencies. In *M'Culloch* v. *State of Maryland*, 4 Wheat. 316, one question discussed was as to the meaning of the word "necessary" as found in the clause of the Constitution giving to Congress power "to make all laws

which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof." Chief Justice Marshall, speaking for the court, said (p. 415):

"This word, then, like others, is used in various senses; and, in its construction, the subject, the context, the intention of the person using them, are all to be taken into view.

"Let this be done in the case under consideration. The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confining the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a Constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which Government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances."

Under the Constitution each State was left with full control over its criminal procedure. No one could have anticipated what changes any State might make therein, and doubtless the word "charged" was used in its broad signification to cover any proceeding which a State might see fit to adopt by which a formal accusation was made against an alleged criminal. In the strictest sense of the term a party is charged with crime when an affidavit is filed, alleging the commission of the offence and a warrant is issued for his arrest, and this is true whether a final trial may or may not be had upon such charge. It may be, and is true, that in many of the States some further proceeding is, in the higher grade of offences at least, necessary before the party can be put upon trial, and that the proceedings before an examining magistrate are preliminary, and only with a view to the arrest and detention of the alleged criminal; but extradition is a mere proceeding in securing arrest and detention. An extradited defendant is not put on trial upon any writ which is issued for the purposes of extradition, any more than he is upon the warrant which is issued by the justice of the peace directing his arrest.

Cases are referred to, such as *Virginia* v. *Paul*, 148 U. S. 107, in which a distinction is made between the preliminary proceedings looking to the arrest and detention of the defendant and those final proceedings upon

which the trial is had. That was a removal case, and, discussing the question, Mr. Justice Gray, speaking for the court, said (p. 119:)

"By the terms of section 643, it is only after 'any civil suit or criminal prosecution is commenced in any court of a State,' and 'before the trial or final hearing thereof,' that it can 'be removed for trial into the Circuit Court next to be holden in the district where the same is pending,' and 'shall proceed as a cause originally commenced in that court.'

"Proceedings before a magistrate to commit a person to jail, or to hold him to bail, in order to secure his appearance to answer for a crime or offence, which the magistrate has no jurisdiction himself to try, before the court in which he may be prosecuted and tried, are but preliminary to the prosecution, and are no more a commencement of the prosecution, than is an arrest by an officer without a warrant for a felony committed in his presence."

But such decisions, instead of making against the use in this constitutional section of the word "charged" in its broad sense, make in its favor, because, as we have noticed, an extradition is simply one step in securing the arrest and detention of the defendant. And these preliminary proceedings are not completed until the party is brought before the court in which the trial may be had. Why should the State be put to the expense of a grand jury and an indictment before securing possession of the party to be tried? It may be true, as counsel urge, that persons are sometimes wrongfully extradited, particularly in cases like the present; that a creditor may wantonly swear to an affidavit charging a debtor with obtaining goods under false pretences. But it is also true that a prosecuting officer may either wantonly or ignorantly file an information charging a like offence. But who would doubt that an information, where that is the statutory pleading for purposes of trial, is sufficient to justify an extradition? Such possibilities as these cannot be guarded against. While courts will always endeavor to see that no such attempted wrong is successful, on the other hand care must be taken that the process of extradition be not so burdened as to make it practically valueless. It is but one step in securing the presence of the defendant in the court in which he may be tried, and in no manner determines the question of guilt.

While perhaps more pertinent as illustration than argument, the practice which obtains in extradition cases between this and other nations is worthy of notice. Sections 5270 to 5277 R. S. inclusive provide for this matter. In none of these sections or in subsequent amendments or additions thereto is there any stipulation for an indictment as a prerequisite to extradition. On the contrary, the proceedings assimilate very closely those commenced in any State for the arrest and detention of an alleged criminal. They go upon the theory that extradition is but a mere step in securing the presence of the defendant in the court in which he may lawfully be tried. In the memorandum issued by the Department of State in May, 1890, in reference to

the extradition of fugitives from the United States in British jurisdiction, is this statement (1 Moore on Extradition, p. 335):

"It is stipulated in the treaties with Great Britain that extradition shall only be granted on such evidence of criminality as, according to the laws of the place where the fugitive or person charged shall be found, would justify his apprehension and commitment for trial if the crime or offence had there been committed.

"It is admissible as constituting such evidence to produce a properly certified copy of an indictment found against the fugitive by a grand jury, or of any information made before an examining magistrate, accompanied by one or more depositions setting forth as fully as possible the circumstances of the crime."

And this is in general harmony with the thought underlying extradition.

Entertaining these views, we answer the first question in the affirmative and the second in the negative.

Mr. Justice HARLAN did not hear the argument and took no part in the decision of this case.

True copy.

Test:

Clerk Supreme Court, U. S.